92-737

NO. (1)

FILED
SEP 29 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STUART M. NELKIN
CAROL NELKIN
Attorneys for Petitioner
NELKIN & NELKIN, P.C.
5417 Chaucer
P.O. Box 25303
Houston, Texas 77265
(713) 526-4500 (tel)
(713) 526-8915 (fax)

September 27, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Rights Act of 1991 is to be applied to cases pending at the time the Act was passed.

2. Whether the District Court and the Court of Appeals erred by reviewing and deciding issues outside the Court of Appeals' mandate issued on September 30, 1981.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 10

I. THE FIFTH CIRCUIT'S DECISION DENYING RETROACTIVITY TO § 101 AND § 105 OF THE CIVIL RIGHTS ACT OF 1991 CONFLICTS WITH DECISIONS OF THIS COURT 10

II. THE FIFTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S DEPARTURE FROM THE FIFTH CIRCUIT'S EARLIER MANDATE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND AT LEAST ONE OTHER COURT OF APPEALS. 12

CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

CASES

Aldana v. Raphael Contractors, Inc.,
785 F. Supp. 1328 (N.D. Ind. 1992) 10

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 12

Bradley v. Richmond School Board,
416 U.S. 696 (1974) 12

Calderon v. Presidio Valley Farmers,
863 F.2d 384 (5th Cir. 1989) 16

Chapman v. National Aeronautics & Space Adm.,
736 F.2d 238 (5th Cir. 1984) 16

Croce v. V.I.P. Real Estate, Inc.,
786 F. Supp. 1141 (E.D.N.Y. 1992) 10

Fray v. Omaha World Herald Co.,
960 F.2d 1370 (8th Cir. 1992) 10

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 16

Johnson v. Uncle Ben's, Inc.,
657 F.2d 750 (5th Cir. 1981) 8

Johnson v. Uncle Ben's, Inc.,
628 F.2d 419 (5th Cir. 1980) 7

Joyner v. Monier Roof Tile, Inc.,
784 F. Supp. 872 (S.D. Fla. 1992) 10

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990) 12

Long v. Carr,
784 F. Supp. 887 (N.D. Ga. 1992) 11

Mozee v. American Commercial Marine
Service Co., 963 F.2d 929
(7th Cir. 1992) 10

Patterson v. McLean Credit Union,
491 U.S. 1964 (1989) 8, 9, 17

Stamper v. Baskerville,
724 F.2d 1106 (4th Cir.), cert. denied,
459 U.S. 1225 (1984) 16

Uncle Ben's, Inc. v. Johnson,
451 U.S. 902 (1981) 7

Vogel v. City of Cincinnati,
959 F.2d 594 (6th Cir. 1992) 10

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 8, 9, 17

Wisdom v. Intrepid Sea-Air Museum,
59 E.P.D. ¶ 41,596 (1992) 10

STATUTES

42 U.S.C. § 1981, as amended 4, 6, 8

Title VII of the Civil Rights Act
of 1964, as amended, 42 U.S.C.
§ 2000e-2(k) 3, 6, 8, 9

MISCELLANEOUS

137 Cong. Rec. H9526-32
(Daily ed. Nov. 7, 1991) 11

137 Cong. Rec. H9530-31
(Daily ed. Nov. 7, 1991) 11

137 Cong. Rec. H9542-49
(Daily ed. Nov. 7, 1991) 11

137 Cong. Rec. S15472-78
(Daily ed. Oct. 30, 1991) 11

137 Cong. Rec. S15483
(Daily ed. Oct. 30, 1991) 11, 12

137 Cong. Rec. S15483-85
(Daily ed. Oct. 30, 1991) 11

137 Cong. Rec. S15485
(Daily ed. Oct. 30, 1991) 11

137 Cong. Rec. S15485-86
(Daily ed. Oct. 30, 1991) 11

137 Cong. Rec. S15952-53
(Daily ed. Nov. 5, 1991) 11

137 Cong. Rec. S15963-64
(Daily ed. Nov. 5, 1991) 11

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Thomas Johnson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 1, 1992.

OPINIONS BELOW

The first opinion of the District Court is reported at 71 F.R.D. 19 (S.D. Tex. 1978), and is reprinted as App. H. The first

opinion of the Court of Appeals is reported at 615 F.2d 915 (5th Cir. 1980), and is reprinted as App. G. The opinion of the Court of Appeals on petition for rehearing is reported at 628 F.2d 419 (5th Cir. 1980), and is reprinted as App. F. This Court's Order granting Uncle Ben's Inc.'s Petition for a Writ of Certiorari, vacating the Court of Appeals' decision, and remanding the case to the Court of Appeals is reported at 451 U.S. 902 (1981), and is reprinted as App. E. The opinion of the Court of Appeals on remand is reported at 657 F.2d 750 (5th Cir. 1981), and is reprinted as App. D. This Court's Order denying Uncle Ben's, Inc. second Petition for a Writ of Certiorari is reported at 459 U.S. 967 (1982), and is reprinted as App. C. The opinion of the District Court on remand is not reported. It is reprinted as App. B. The third opinion of the Court of Appeals is reported at 965 F.2d 1363 (5th Cir. 1992), and is reprinted as App. A.

JURISDICTION

The judgment sought to be reviewed was dated and entered on July 1, 1992. No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(k)

(1) (A) An unlawful employment practice based on disparate impact is established under this title only if --

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

* * *

Equal Rights Under the Law,
42 U.S.C. § 1981, as amended

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Civil Rights Act of 1991

SEC. 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991."

SEC. 2. FINDINGS

The Congress finds that --

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES

The purposes of this Act are --

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1972), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

[This section has been incorporated into 42 U.S.C. § 1981 and is set out above.]

* * *

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

[This section has been incorporated into 42 U.S.C. § 2000e-2 and is set out above.]

* * *

STATEMENT OF THE CASE

Petitioner brought suit on March 28, 1974 alleging that Respondent discriminated against him and all similarly situated Blacks and Mexican-Americans in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Petitioner sought injunctive, declaratory and compensatory relief to redress Respondent's discriminatory practices in compensation, hiring, promotion, transfer, seniority, and other terms and conditions of employment. On September 12, 1975, the District Court certified a class of all "Black and Mexican-American persons who have been employed or are employed or may in the

future be employed by Defendant Uncle Ben's, Inc." The case subsequently was tried from October 3-21, 1977. At the conclusion of Petitioner's case, the District Court dismissed all of Petitioner's claims except those alleging that Black employees had suffered discrimination in obtaining promotions. The District Court found that Petitioner had established a prima facie case of discrimination against Blacks in promotions, but ultimately ruled in favor of Respondent on all issues. On appeal the Fifth Circuit affirmed per curiam, but vacated that decision on rehearing and modified and affirmed in part, reversed in part, and remanded. Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980) expressly holding that "The district court correctly determined that plaintiff's statistical evidence and testimonial evidence made out a prima facie showing of discrimination against Blacks on the promotion issue." 628 F.2d at 423-24. The Court of Appeals then gave explicit instructions to the District Court as to what its role on remand should be.

On April 20, 1981, this Court granted Respondent's petition for a writ of certiorari, vacated the decision of the Fifth Circuit and remanded the case. 451 U.S. 902 (1981). On remand, the Fifth

Circuit reaffirmed its prior holding and remanded the case in accordance with its 1980 opinion. 657 F.2d 750 (5th Cir. 1981). Respondent's second petition for writ of certiorari was denied by this Court on November 1, 1982. 459 U.S. 967 (1982).

Upon the death of the district judge before whom the case had been tried, the case was reassigned. On May 2, 1991, without any additional evidentiary proceedings, the subsequently assigned district judge entered an Opinion on Final Judgment in which he found that "Because Johnson was unable to establish a prima facie case under 42 U.S.C. § 1981 or Title VII, summary judgment for Uncle Ben's is appropriate based on the standard that Johnson produced no genuine issues of material fact in this case." The district judge relied heavily on Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) and Patterson v. McLean Credit Union, 491 U.S. 1964 (1989). Notice of Appeal was filed on May 30, 1991.

Prior to oral argument in the Fifth Circuit, the Civil Rights Act of 1991 was enacted. That statute expressly overruled both the Wards Cove and Patterson decisions. On July 1, 1992, the Fifth Circuit affirmed the District Court's grant of summary judgment

expressly holding that the Civil Rights Act of 1991 was not to be applied retroactively and that the District Court's revisiting the entire case in direct violation of the Fifth Circuit's previous mandate was warranted in light of the intervening Wards Cove and Patterson decisions by this Court.

In the course of its opinion, the Fifth Circuit stated:

> We recognize the apparent anomaly that at the time of [respondent's] discriminating conduct, Patterson had not yet been decided and, under the decision of many lower courts, § 1981 applied to racial discrimination in promotions.

965 F.2d at 1374. Nevertheless, the Fifth Circuit went on to state "as a matter of law, the rule announced in Patterson applied retroactively to [respondent's conduct in 1974]". Id. Thus, the Fifth Circuit found that this Court's 1989 decision in Patterson was to be applied retroactively to immunize Respondent's 1974 conduct but that the Congressional abrogation of Wards Cove and Patterson two years later was not to be applied retroactively. The result of this "apparent anomaly" has been to judge a 1977 trial record by standards first established in 1989 although those standards no longer existed at the

time the Court of Appeals considered the appeal of the subsequently assigned district judge's review of the 1977 trial record.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION DENYING RETROACTIVITY TO § 101 AND § 105 OF THE CIVIL RIGHTS ACT OF 1991 CONFLICTS WITH DECISIONS OF THIS COURT.

In the short time since its enactment, the Civil Rights Act of 1991 has spawned a veritable flood of decisions by lower courts on its applicability to conduct and litigation that predate the Act. See, e.g., Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992) (denying retroactivity); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) (denying retroactivity); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) (denying retroactivity); Croce v. V.I.P. Real Estate, Inc., 786 F. Supp. 1141 (E.D.N.Y. 1992) (granting retroactivity); Wisdom v. Intrepid Sea-Air Museum, 59 E.P.D. ¶ 41,596 (1992) (granting retroactivity); Aldana v. Raphael Contractors, Inc., 785 F. Supp. 1328 (N.D. Ind. 1992) (granting retroactivity); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. 1992) (granting retroactivity); and Long v. Carr, 784 F. Supp. 887 (N.D. Ga. 1992) (granting retroactivity).

The confusion in this area is understandable since the legislative history is ambiguous and contradictory,[1] and there are two

---

[1] The legislative history regarding the retroactive application of the Act is decidedly ambiguous and unusual. There are no Committee Reports on the Act as finally enacted; instead, a series of Interpretive Memoranda were introduced by individual Senators regarding the Act, all of which conflict with one another on the critical question of whether the Act applies to pending cases. See 137 Cong. Rec. S15472-78 (Daily ed. Oct. 30, 1991) (Section-by-Section Analysis of Sen. Dole); 137 Cong. Rec. S15483-85 (Daily ed. Oct. 30, 1991) (Interpretive Memorandum of Sen. Danforth); 137 Cong. Rec. S15485-86 (Daily ed. Oct. 30, 1991) (Statement of Sen. Kennedy); 137 Cong. Rec. S15952-53 (Daily ed. Nov. 5, 1991) (Sen. Dole's legislative history on technical amendments); 137 Cong. Rec. S15963-64 (Daily ed. Nov. 5, 1991) (Sen. Kennedy's analysis of technical amendments); 137 Cong. Rec. H9542-49 (Daily ed. Nov. 7, 1991) (Interpretive Memorandum of Rep. Hyde); 137 Cong. Rec. H9526-32 (Daily ed. Nov. 7, 1991) (Section-by-Section Analysis of Rep. Edwards). Indeed, the principal sponsors of the Act, Senators Danforth and Kennedy, disagreed on the retroactive application of the Act. See 137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991) (Statement of Sen. Danforth) and 137 Cong. Rec. S15485 (Daily ed. Oct. 30, 1991) (Statement of Sen. Kennedy).

Although the legislative history is conflicting on the question of retroactivity, the more persuasive and extensive analysis was offered by those who supported retroactive application. The Section-by-Section Analysis of Representative Edwards provides the most extensive analysis of the case law on retroactivity, and his analysis was never refuted. See 137 Cong. Rec. H9530-31 (Daily ed. Nov. 7, 1991). Likewise, Senator Kennedy's analysis of the Supreme Court precedents was never refuted; instead, Senator Danforth "disapproved" applicable Supreme Court precedent. See 137 Cong. Rec. S15485 (Daily ed. Oct. 30, 1991) (Statement of Sen. Kennedy); 137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991) (Statement of Sen. Danforth).

irreconcilable lines of Supreme Court authority on the issue of retroactivity. Compare Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) with Bradley v. Richmond School Board, 416 U.S. 696 (1974). Thus, in the lower courts, the conclusion of retroactivity is driven by which of the two lines of authority is selected as controlling. Only this Court can resolve the conflict and attendant confusion, and it should do so. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 840-58 (1990) (Scalia, J. concurring).

II. THE FIFTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S DEPARTURE FROM THE FIFTH CIRCUIT'S EARLIER MANDATE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND AT LEAST ONE OTHER COURT OF APPEALS.

The violence done to orderly process and the absolute unfairness imposed upon litigants by the Fifth Circuit's ignoring the pronouncements of this Court and others on the force and effect of an appellate court mandate is readily apparent from the facts of this case. The latest appeal to the Fifth Circuit came to that Court with a lengthy history extending over 14 years between the conclusion of the trial and the appeal. That history, which included multiple

appeals and the death of the District Judge who presided at trial, existed at the time the case was reassigned in August 1988. By that time, the Fifth Circuit had issued two opinions in this case in which specific findings had been made and detailed instructions had been given as to what it expected to be done by the District Court upon remand.

In its 1980 opinion, the Fifth Circuit found that "The district court correctly determined that plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks on the promotion issue." 628 F.2d at 423-24. The Fifth Circuit also found that:

> Plaintiffs' case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels.[2]

---

[2] Plaintiffs demonstrated, inter alia, that of the 172 plant hourly positions, 118 such positions were held by blacks (68.6%). In the next four higher zones, blacks held 30 of the 67 positions (44.8%). Taking higher plant hourly pay zones into account as well as all office hourly jobs and the salaried jobs, blacks represented

> 35.8% of Uncle Ben's total work force. The overall pattern appeared to be one of blacks being clustered in the lowest paying jobs. Even those few blacks who entered the generally more desirable salaried jobs tended to be clustered in the least remunerative and responsible jobs at those levels.

628 F.2d at 423. The Fifth Circuit then stated that:

> The dispositive issue is whether Uncle Ben's ordinarily employs individuals for upper level positions by hiring laterally from outside the company or by promoting from within. If it hires laterally, the relevant comparison is to the general or qualified outside labor force. If Uncle Ben's fills jobs by promotions, the relevant comparison, as we recognized in James v. Stockham Valves & Fittings Co., 559 F.2d at 331, 341, is the company's internal work force.

628 F.2d at 425. The Fifth Circuit then concluded that "[W]e must know how many of those 394 employees hold jobs that ordinarily cannot be filled by promotion to decide the question of discriminatory impact". Id.

The Fifth Circuit gave explicit instructions to the District Court as to what its role on remand should be. The District Court was instructed that it was to determine the number of Respondent's

jobs that were filled by promotion and the number that were filled by hiring from outside of the Respondent's work force. Secondly, the District Court was instructed to decide whether Respondent had discredited Petitioner's prima facie showing that Blacks were relegated to lower level jobs and were promoted at a significantly slower rate than Whites. Thirdly, the District Court was instructed to determine whether the legitimate non-discriminatory reasons that it credited when reviewed in light of the correct view of the controlling legal principles on that point applied to positions filled by promotion and not to positions filled by lateral hire. 628 F.2d at 426.

Rather than comply with the mandate of the Fifth Court, the District Court engaged in a de novo review of the record and, in sweeping conclusory terms, held that Petitioner did not establish a prima facie case under Title VII, and failed to show as part of his prima facie case the specific elements of the promotion process which had a disparate impact on "nonwhites."

In In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895), this Court held that once a case has been decided on appeal

and a mandate issued, the lower court may not "vary it [the mandate] or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." Accord, Stampel v. Baskerville, 724 F.2d 1106 (4th Cir.), cert. denied, 459 U.S. 1225 (1984).[2]

As the Fifth Circuit itself held in Chapman v. National Aeronautics & Space Adm., 736 F.2d 238 (5th Cir. 1984):

> The "law of the case" doctrine, as it applies to this case, operates to preclude a reexamination of issues of law decided on appeal, explicitly or by necessary implication, either by the district court on remand or by the appellate court on a subsequent appeal. Conway v. Chemical Leaman Tank Lines, Inc., 644 F.2d 1059, 1061-62 (5th Cir. 1981); Lehrman v. Gulf Oil Corp., 500 F.2d 1128, 43 L.Ed.2d 400 (1974). It is a restriction self-imposed on the courts to further the interests of

---

[2] In fact, the Fifth Circuit has itself relied on these precedents in holding that a "trial court may decide matters left open on remand only insofar as they are consistent with [the] appellate court's mandate". Calderon v. Presidio Valley Farmers, 863 F.2d 384, 387 (5th Cir. 1989).

> judicial efficiency, and is based on the policy that issues once decided should remain so. An appellate court could not perform its duties satisfactorily or efficiently if every question it once considered and decided remained open for reexamination in subsequent proceedings in that same case.

736 F.2d at 241. Thus, the Fifth Circuit's approval of the District Court's failure to follow the Court of Appeals' mandate renders nugatory the 100 year old pronouncement of this Court that an appellate mandate is to be respected and observed.

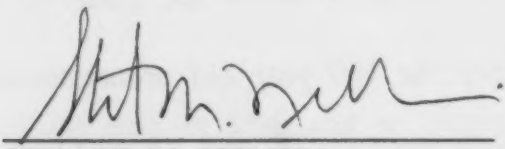
The Fifth Circuit held that the "mandate rule" was obviated by virtue of the intervening decisions of this Court in Wards Cove and Patterson which in 1989 changed the standards that governed the 1977 trial of this case, despite the fact that at the time the Fifth Circuit considered this appeal, Wards Cove and Patterson had been Congressionally nullified after a brief two-year existence. Thus, in a context that can only be charitably characterized as ironic, under the Fifth Circuit's opinion Respondent is allowed to escape liability for conduct unlawful at the time it occurred, unlawful at the time the case was tried, and unlawful at the time the Fifth Circuit rendered its last decision. Such departure from the accepted and usual course of

judicial proceedings should be redressed by granting Petitioner's request for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



STUART M. NELKIN
CAROL NELKIN

NELKIN & NELKIN, P.C.
5417 Chaucer
P. O. Box 25303
Houston, Texas 77265
(713) 526-4500

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

STUART M. NELKIN
CAROL NELKIN
Attorneys for Petitioner
NELKIN & NELKIN, P.C.
5417 Chaucer
P.O. Box 25303
Houston, Texas 77265
(713) 526-4500 (tel)
(713) 526-8915 (fax)

September 27, 1992

CONTENTS

APPENDIX A	Third Opinion of the Fifth Circuit, reported at 975 F.2d 1363 (5th Cir. 1992)
APPENDIX B	Opinion of the District court on Remand, not reported
APPENDIX C	Order of Supreme Court of the United States Denying Uncle Ben's, Inc. Second Petition for Writ of Certiorari, reported at 459 U.S. 967 (1982)
APPENDIX D	Opinion of the Fifth Circuit on Remand from the Supreme Court of the United States, reported at 657 F.2d 750 (5th Cir. 1981)
APPENDIX E	Order of the Supreme Court of the United States on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, reported at 451 U.S. 902 (1981)
APPENDIX F	Opinion of the Fifth Circuit Below on Rehearing, reported at 628 F.2d 419 (5th Cir. 1980)
APPENDIX G	First Opinion of the Fifth Circuit Below, reported at 615 F.2d 915 (5th Cir. 1980)
APPENDIX H	Findings of Fact and Conclusions of Law Entered By the District Court, reported at 71 F.R.D. 19 (S.D. Tex. 1978)

BEST AVAILABLE COPY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2590

THOMAS JOHNSON,

Plaintiff-Appellant,

versus

UNCLE BEN'S, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before WILLIAMS, JOLLY, and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

This employment discrimination class action has been in the federal courts for eighteen years, a captive to large changes in the controlling law. It now makes its third appearance before this court. On behalf of himself and similarly situated class members, Thomas

Johnson appeals the grant of summary judgment in favor of Uncle Ben's, Inc. We affirm.

I.

Thomas Johnson, an employee at a rice-processing plant owned by Uncle Ben's, Inc., filed this suit in 1974. The complaint alleged that, commencing in March 1972, UBI discriminated against him and similarly situated Black and Mexican-American employees in violation of 42 U.S.C. § 1981. He amended the complaint in 1975 to add a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The district court certified a class of Black and Mexican-American persons who have been employed or may in the future be employed by UBI. The case was tried to the bench from October 3 until October 21, 1977. At the conclusion of Johnson's direct case, the district court dismissed all claims except discrimination in the promotion of Black employees. UBI then called its personnel manager and three expert witnesses. At the conclusion of Johnson's direct examination of an expert rebuttal witness, the district court granted judgment in favor of UBI.

The first district court opinion held that the proportion of Blacks to whites in each job title at UBI should be compared to the ratio of Black to white workers in comparable jobs in the Houston Standard Metropolitan Statistical Area. Finding that the ratio of Black to white workers in each job title at UBI was similar to the proportion of Black to white workers in comparable jobs in the Houston SMSA, the district court held that UBI had not violated Title VII. Johnson I, 628 F.2d at 425.

We in turn vacated and remanded for further findings, holding that workers employed in similar jobs in the Houston SMSA were not necessarily the benchmark qualified applicant pool. Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980). We stated:

> "If [UBI] hires laterally, the relevant comparison is to the general or qualified outside labor force. If Uncle Ben's fills jobs by promotion, the relevant comparison, as we recognized in James v. Stockham Valves & Fittings Co., 559 F.2d at 331, 341, is the company's internal work force. The applicability of James in any given case turns on whether vacancies in non-entry level positions are or could be filled by promotion. If the vacant positions ordinarily are filled by lateral hires or hiring from among graduates of relevant educational programs, then the rigid James rule is inapplicable."

Johnson I, 628 F.2d at 425. We remanded for findings regarding "how many of those 394 employees [at UBI] hold jobs that ordinarily cannot be filled by promotion." Id. The district court was instructed to "determine the number of Uncle Ben's jobs that were filled by promotion and the number that were filled by hiring from outside of the Uncle Ben's work force." Id. at 426.

The Supreme Court, however, vacated Johnson I and remanded the case for reconsideration in light of its decision in Texas Dep't of Community Affairs v. Burdine, 451 U.S. 248 (1981). Uncle Ben's, Inc. v. Johnson, 451 U.S. 902 (1981). On remand, we held that Burdine was inapplicable to this disparate impact case and again remanded to the district court for further proceedings as stated in Johnson I. Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981).

Judge Sterling, who originally tried this case and issued the first district court opinion reviewed in Johnson I, died while this case was pending. The case was then assigned to Judge Hughes. On May 2, 1991, Judge Hughes granted summary judgment in favor of UBI. In his opinion, Judge Hughes stated that judgment for UBI was

appropriate because Johnson had failed to make a prima facie case of disparate impact and had not stated an actionable claim under § 1981.

The district court held that Johnson proved only that there was a "high percentage of Black employees at Uncle Ben [sic] in low-level jobs versus a low percentage of minority employees in high level jobs." Because Johnson failed to prove that low level employees were the appropriate pool of qualified persons in the relevant labor market, he failed to prove any disparate impact.

The district court also found that Johnson failed to prove that any specific employment practice had a disparate impact upon the rate of Black promotion and that UBI had, in any event, rebutted any prima facie case by producing legitimate business reasons for its employment practices. Finally, relying on Patterson v. McClean Credit Union, 491 U.S. 164 (1989), the district court rejected Johnson's § 1981 claim, finding that the claim did not rest on discrimination in the formation of a new employment contract.

The trial evidence consists largely of statistics concerning placement of Black and white employees at UBI's two processing plants and administrative offices in Houston, Texas. UBI's

workforce is organized into three categories--plant workers paid an hourly wage, office workers paid an hourly wage, and salaried personnel. Each group is, in turn, subdivided into "zones," each zone representing a wage or salary range.

Johnson presented undisputed statistical evidence that Black employees were generally clustered in the bottom job zones within each of the three job categories, while the top job zones in each category were filled by white employees. Black employees comprise 95.3% of the workforce in the three lowest plant hourly job zones, holding jobs as porters, warehousemen, packers, fork lift operators, fumigators, bran hull helpers, rough rice helpers, and mill helpers. However, white employees held all of the highest two plant hourly job zones, including maintenance first class, boiler operator, and miller first class. The patterns were similar in office hourly and salaried positions. That is, Blacks were in the lowest office job zones, such as cafe porter, junior file clerk, and cook, and lowest salaried positions, including microbiology analyst and accountant. Whites held jobs in the higher zones in both office and salaried categories, including stenographer, export-service clerk, receptionist,

and computer operator and most of the salaried managerial and supervisory positions.

Johnson did not deny that promotion across category lines, while possible, was unusual. Generally, workers were promoted only to the top of the job category in which they start their employment. However, the parties fiercely disputed the lines of promotion within each of the three job categories. UBI argued at trial and on appeal that workers qualified to hold jobs in the lower zones of a job category were not necessarily qualified to hold higher jobs in the same category.

Johnson replied that the court should look to lower job zones as the qualified applicant pool for the higher job zones because the natural line of progression was a low level entry followed by gradual promotions through the job zones rising through the plant, office, or salaried hierarchy. He argues that Black employees were not promoted at the same rate as whites. Black workers entered at a low level and stayed there, stopped by a glass ceiling of race discrimination.

Johnson offered data showing that most jobs at UBI were filled through promotion. According to Johnson's undisputed evidence, in March of 1972, 65.3% of all the salaried positions, 53.6% of the office hourly positions, and 91.0% of the plant hourly positions at UBI were filled by promotion and not by initial hire from outside the UBI workforce. Johnson's data, however, said little about which jobs at UBI were filled by promotion or, more importantly, from which jobs different UBI jobholders were promoted.

II. Johnson's Title VII Claim

Johnson contends that three of UBI's employment practices--tests, formal educational requirements, and subjective promotion decisions by supervisors--had the effect of denying promotions to a disparate proportion of Black employees. For his prima facie case of disparate impact, Johnson "need[ed] only show that the facially neutral employment standards operate more harshly on one group than another." Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 621 (5th Cir. 1983). This initial burden included proof of a specific practice or set of practices resulting in a significant

disparity between the proportion of Black employees at UBI and the proportion of Blacks in the pool of qualified applicants. Cox v. City of Chicago, 868 F.2d 217, 220 (7th Cir. 1989).

Statistical disparities between the relevant labor pool and UBI's workforce are not sufficient. Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800-801 (5th Cir. 1982). A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Wards Cove Packing Co., Inc. v. Atonio, 109 S.Ct. 2115, 2124 (1989) (quoting Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2788 (1988) (plurality opinion)). Johnson must also "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs and promotions because of their membership in a protected group." Watson, 108 S.Ct. at 2788-89; Pouncy, 668 F.2d at 801 ("The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force"). Absent "a systematic analysis of the racial effects of all promotional criteria for each rank," Black

Fire Fighters Ass'n. v. City of Dallas, Texas, 905 F.2d 63, 63 (5th Cir. 1990), Johnson cannot establish a prima facie case of disparate impact.

Johnson challenges three employment practices: UBI's "educational requirements," UBI's "subjective system of promotion," and UBI's use of irrelevant employment tests. Johnson was able to do little more than describe the content or application of the requirements. He failed a fortiori to show the specific effect that each had on Black promotions.

As evidence of UBI's educational requirements, Johnson cites the testimony of Dr. Richard Jeanneret, an industrial psychologist and UBI's expert witness. Jeanneret testified concerning his study of 119 job titles at UBI, in which he interviewed UBI's employees, observed work at UBI's facilities, and studied various job descriptions. At trial, he testified about the level of education that he believed UBI employees would need to perform different jobs successfully. Jeanneret did not explain in detail which jobs at UBI required which levels of education. He simply described the number

of jobs at UBI that required a high school or college degree "or equivalent experience."[1/]

Jeanneret also did not purport to testify concerning the educational levels that UBI actually required. Rather, he testified only about the skills he believed UBI's employees ought to have. He conceded that UBI's own job descriptions did not contain "written educational requirements" and that he was testifying from his "expertise as opposed to some requirement that is imposed at Uncle Ben's." Jeanneret testified that UBI's "posting notices" announcing "something about education or an education related item" such as "training in . . . chemistry or math," but he did not testify at any time that UBI actually required employees to have any degrees or formal education level for promotion to any UBI job.

[1/] Dr. Jeanneret testified out of roughly 191 jobs, 39 of the jobs required a college degree, 27 required "some college perhaps or some type of training beyond that which one normally gets at high school," 39 required "either high school or some form of vocational school or some other type of equivalent education," 45 jobs would require "simply a high school education or equivalent experience," and 43 jobs would require "less than a high school education."

Dr. Jeanneret's testimony, therefore, does not compel the conclusion that UBI had formal educational prerequisites for promotion. Aside from Dr. Jeanneret's testimony, Johnson relies on his own testimony to establish that educational requirements existed at UBI. He testified that a supervisor told him that "you don't have the science background or the academic background to satisfy the needs of the job [to which Johnson sought promotion]" (emphasis added). However, even if the district court credited Johnson's testimony, that testimony indicates at most that a supervisor told Johnson that he lacked necessary "background" in science, not that Johnson lacked a formal degree or other specific educational prerequisite to promotion. According to Johnson's own testimony, the supervisor simply informed Johnson that "you don't have the skills that we are looking for." This testimony indicates at most that UBI required some unspecified level of scientific training.

In contrast to the testimony of Dr. Jeanneret and Johnson himself, UBI's personnel director, Herman Koehn, presented specific testimony that UBI did not require any particular level of education for most of the jobs at UBI. Koehn testified that "[w]e don't make

an evaluation on whether [one] finished high school or not in terms of [whether one will] be[] offered a job." According to Koehn, he "never thought about job requirements in terms of high school or no high school." Rather than rely on formal education, Koehn testified that UBI

> "would focus on the job and the ability to make numerical calculations and reading and writing. And [this would] not necessarily [be] reflected upon the number of years at school. It would be what they had learned and what they were able to do through displaying what they can do on the job."

Koehn also noted that there were supervisors who had never obtained a college degree. Koehn admitted that food supervisors in research and development had to have "knowledge in the sciences," but he denied that this knowledge required a "specific degree." Rather, the supervisor in research and development needed "an educational background in the "physical sciences, chemistry, courses that relate to . . . food science." Koehn also stated that microbiology analysts ought to have "academic training in microbiology," but, again, he did not specify the level of training expected.

In short, Johnson presented frail evidence concerning the differing educational backgrounds that UBI required for different jobs

and presented no evidence whatsoever concerning how many Black employees failed to meet UBI's requirements. Johnson contends that any educational requirements, regardless of their content, would "by definition" have a disparate impact on Black promotion rates, because Blacks in general tend to have less education than whites. To support this argument, Johnson cites national data from the 1970 U.S. census in his brief on appeal.

The national population, however, is not the qualified labor pool against which UBI's workforce should be compared. The effect of educational requirements on the ability of Blacks in the national population to get promotions at UBI has little relevance. New York Transit Authority v. Beazer, 440 U.S. 568, 584-87 (1979) (statistics showing that 63%-65% of methadone users in New York City's public programs were Black or Hispanic does not show that a disproportionate number of Black or Hispanic Transit Authority employees were dismissed for using methadone). The question is whether and how specific educational requirements affected UBI employees seeking promotions. It is not obvious that Black UBI employees in the pool of employees qualified for promotion to higher

levels would not have the skills or education allegedly required for promotion.

In short, there was little record evidence of the effects of educational requirements on Black promotion rates from the qualified applicant pool--employees at UBI. This is not to say that UBI's entire internal workforce constituted the appropriate statistical pool against which the proportion of Black employees at UBI should be measured. Assuming without deciding that some job zones at UBI should be compared with other lower UBI job zones, we find a complete absence of evidence that UBI employees were barred by educational requirements from reaching higher levels of employment at UBI. The district court did not clearly err in finding that Johnson failed to show that these alleged educational requirements affected Black promotion.

Johnson also argues that UBI allowed its supervisors to make promotion decisions subjectively and that this practice resulted in a disparity between the promotion rates of Black and white employees. However, "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise

no inference of discriminatory conduct." Watson, 108 S.Ct. at 2786. See also Pouncy, 668 F.2d at 801-02. Johnson has not offered any evidence that Blacks' allegedly smaller number of promotions was causally related to this subjectivity. This cannot suffice to establish a prima facie case. Wards Cove, 109 S.Ct. at 2124-25.

Finally, Johnson refers to UBI's "use of invalidated employment tests" as one challenged employment practice that had a disparate impact on Black employees seeking promotions. There was testimony that UBI had used three different written tests to evaluate job applicants: (1) a typing test for jobs requiring typing; (2) an arithmetic aptitude test for clerical jobs requiring calculation such as statistical clerk; and (3) a "mental adaptability test," which purported to test basic reading and math skills. The last test was apparently discontinued sometime between 1971 and 1973.

Johnson presented no evidence of the effects of these tests on Black promotions. There was no testimony that Blacks performed more poorly on these tests than whites or that any Black employee was denied a promotion as a result of his performance on these tests. Indeed, Ethylene Burks, one of Johnson's witnesses and the only

witness to testify about a Black employee's performance on the mental adaptability test, stated that the employee achieved a high score of 90 on the test. Burks also testified that achievement of any particular test score was not a prerequisite for promotion and that test scores were only one factor among many that a supervisor might consider. Given the dearth of evidence on the effects of the various tests on Black promotion rates, we conclude that Johnson failed to establish any causal nexus between the scores and the alleged disparate impact.

Johnson contends that this court's earlier decision in Johnson I precludes the district court from finding that he head failed to make a prima facie case. According to Johnson, the Johnson I court remanded for the narrow purpose of determining whether the appropriate pool of qualified applicants constituted the entire workforce of UBI or the population of people holding jobs similar to those at UBI in the Houston Standard Metropolitan Statistical Area. Johnson also argues that, if most jobs at UBI were filled through promotion, then, under Johnson I, the district court was required to

find that Johnson had succeeded in establishing a prima facie case of disparate impact.

We need not determine whether or not the district court's findings went beyond the mandate of the Johnson I court. Assuming arguendo that they did, we find that intervening Supreme Court decisions justified such a departure. The "mandate rule" is "a specific application of the 'law of the case' doctrine.'" Piambino v. Bailey, 757 F.2d 1112, 1120 (5th Cir. 1985). Under this rule, the district court must follow an appellate decision on an issue in all subsequent trial proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result or if the appellate decision is clearly erroneous and, if implemented, would work an egregious result. Falcon v. General Telephone Co., 815 F.2d 317, 320 (5th Cir. 1987).

If the Johnson I court held that a disparity between the proportion of Blacks in UBI's workforce and the relevant labor pool of qualified applicants together with the use of challenged employment practices were sufficient to establish a prima facie case of disparate impact, it has been contradicted by the Supreme Court's

decision in Wards Cove, the Supreme Court's plurality opinion in Watson, and this court's decision in Pouncy. As we have explained, Johnson must identify a causal nexus between a specific employment practice and a disparity in Black promotions. The district court did not err in following Wards Cove and requiring evidence that the particular challenged practices caused a disparity in Black promotions.

III. Johnson's § 1981 Claim

Citing Patterson v. McClean Credit Union, 491 U.S. 164 (1989), the district court held that Johnson's allegations of intentional discrimination were not actionable under 42 U.S.C. § 1981, because Johnson's allegations concerned "post-formation conduct of the employment relationship, rather than . . . the making or enforcing of a new contract." The district court found that Johnson's evidence of discrimination was based entirely on discrimination in "wage increases" and in promotions within each of the three basic job categories. The district court held that movement within each of the three categories--plant hourly, office hourly, and salaried--did not

work sufficient change in the employer-employee relationship under Patterson.

Patterson requires discriminatory "conduct at the initial formation of the contract" or "conduct which impairs the right to enforce contract obligations through legal process." Patterson, 109 S.Ct. at 2374. Discriminatory denials of promotion do not state a claim under § 1981 unless the promotion denied to the plaintiff "rises to the level of an opportunity for a new and distinct relation between employee and employer." Id. at 2377.

Determining whether a promotion would create a "new and distinct relation" requires a fact-specific examination into employee's duties, pay, and responsibiiity before and after the promotion. Harrison v. Associates Corp. of North America, 917 F.2d 195, 198 (5th Cir. 1990). The inquiry does not lend itself to blanket prescriptions. At the least, "[R]outine increases in salary and responsibility which are clearly part of an original contract of employment" do not signal a new employment relation. Harrison, 917 F.2d at 198. "It would be very odd to regard each rung on the

career ladder as a different employment relation." McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990).

Johnson presented little evidence of the precise nature of the promotions assertedly denied its class members. Rather, Johnson urged that class members were denied promotion "from hourly-paid positions to salaried positions and from non-supervisory positions to supervisory positions." Johnson's anecdotal evidence of specific attempts to obtain promotions showed that the promotions involved routine upward movement by one or two job zones within a single job category--plant, office, or salaried. In most cases, both the pay raise and the change in responsibilities were modest, involving no assumption or supervisory responsibility or change from wage payment to payment of salary.

For instance, Ida Johnson, a junior file clerk (office job zone two), applied for the position of traffic clerk (office job zone four). Both jobs were essentially non-supervisory, clerical positions paid by the hour, the latter being distinguished primarily by the new duty of typing. Likewise, Marie Horner testified that a typist, Brenda Smith, was denied a promotion to the position of office receptionist--again,

a move of two zones from one non-supervisory, office-hourly position to another. Zachary Perkins was denied a promotion from steeper-cooker (plant zone four) to dryer operator (plant zone seven). Both were non-supervisory positions involving the operation of plant machinery, and Perkins testified that steeper-cooker operators were normally promoted to dryer operator as a matter of course.

Two class members present a closer case. Clyde Cobb and Johnson himself sought and were denied promotions from non-supervisory jobs in salaried job zone seven (the lowest salaried job zone) to a supervisory position. As the promotion sought was from a non-supervisory position to a supervisory position, there is not a complete absence of evidence that the promotion involved a new employment relation: changes in supervisory status are relevant to determining whether a promotion creates a new and distinct relation under Patterson. Sitgraves v. Allied-Signal, Inc., 953 F.2d 570, 574 (9th Cir. 1992).

However, we find that the record evidence concerning the promotions sought by Cobb and Johnson is insufficient to create a genuine fact question. Attainment of supervisory status does not

alone create a new and distinct employment relation. Partee v. Metropolitan School District of Washington Township, 954 F.2d 454, 457 (7th Cir. 1992); Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1051-55 (7th Cir. 1991). Aside from the supervisory status of the jobs sought by Cobb and Johnson, the other evidence suggested that the promotions would not create a new employment relation. Dr. Jeanneret's undisputed testimony about the supervisory positions was that they could only be filled through promotion from lower-zoned positions.[2/] Such testimony indicates that the positions were simply rungs on a career ladder, not new employment contracts. Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989).

In any case, aside from the fact that Johnson and Cobb sought supervisory positions, Johnson has not pointed to specific record evidence that the promotions sought by Cobb and Johnson would create new employment relations. Given that the change from a non-

---

[2/] On cross-examination, Dr. Jeanneret testified that "all of these jobs [administrators and managers] would require experience at Uncle Ben's really before assuming the position," and he agreed that such positions were "jobs that a person has to be promoted into."

supervisory to a supervisory position does not suffice by itself to create a new employment relation, Johnson has not carried his summary judgment burden. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986); Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-17 (5th Cir. 1992).

Johnson's general contention that the promotions in this case involved "new and distinct relations" sits uneasily with his contention at trial that UBI's job zones represented routine steps in a sequential hierarchy in which work in each job zone gave the qualifications needed for the duties of the next zone. With such a natural progression, promotion within a single job category and across only one or two pay zones is not likely to create a new employment contract. To the contrary, they appear to be a fulfillment of expectations implicit in the original employment contract. Johnson strenuously argued at trial that the zone-by-zone promotion was simply the ordinary progression of a UBI employee. It is difficult to accept that proposition and also the proposition that each promotion represented a "new and distinct relation." Carter v. South Central Bell, 912 F.2d 832, 840 (5th Cir. 1990). The district court did not

err in concluding that under the undisputed evidence there was no "new and distinct relation between employee and employer" within the meaning of Patterson.

IV. Retroactivity of the Civil Rights Act of 1992

In a Rule 28(j) letter sent to the clerk of this court four days after the enactment of the Civil Rights Act of 1991, Johnson argued that the Civil Rights Act of 1992 ought to be applied to this case retroactively. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k), however, did not alter the "particularity" aspect of Wards Cove as applied in this case.[2] The application of the Act has no effect on our disposition of Johnson's Title VII disparate impact claim, and we need not address whether the Act's provisions affecting Title VII disparate impact claims are retroactive.

---

[2] Section 105(a) of the Act, 42 U.S.C. § 2000e-2(k)(B)(i)(A)(i) provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice."

The Act would, however, affect the disposition of Johnson's § 1981 claim. Section 101(2)(b) of the Act construes § 1981 to include

> "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

42 U.S.C. § 1981(b). Under § 1981 as amended by the Act, racial harassment and other discrimination in an employment relation occurring after contract formation is actionable. If the Act applies to this case, the district court erred in dismissing Johnson's § 1981 action on the ground that the discrimination did not occur during the formation of a new employment relation.

We must determine whether § 101 of the Act amending § 1981 applies retroactively to cases pending when the Act was enacted. We have not previously addressed the issue. Three circuits and the Equal Employment Opportunity Commission have done so. Luddington v. Indiana Bell Telephone Co., No. 91-2320 (7th Cir. June 15, 1992) (Posner, J.); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Mozee v. American Commercial Marine Service Co., No. 90-2660 (7th Cir. May 7, 1992); Vogel v. City of

Cincinnati, 959 F.2d 594 (6th Cir. 1992); EEOC Notice No. 915.002 (December 27, 1991). All have found that the Act does not apply retroactively to conduct occurring before the effective date of the Act.

We find the holdings of all other circuits on this issue persuasive. The statutory language and legislative history is inconclusive on the question of retroactive application. Applying a general presumption against retroactive application of substantive laws, we find that § 101 of the Act, 42 U.S.C. § 1981(b), should not be applied to a case pending on appeal that was filed and decided by the trial court before the enactment of § 101 and that arises out of conduct occurring before § 101's enactment.

In determining whether a statute is retroactive, we look first to the language of the statute. The language of the Civil Rights Act of 1991 offers little help. As one court has noted, Congress "dumped the [retroactivity] question into the judiciary's lap without guidance." Luddington, No. 2320, at 3. The Act nowhere states that it applies either prospectively or retrospectively. It is silent on

the subject, stating only that it "shall take effect upon enactment"--November 21, 1991.

Sections 109(c) and 402(b) of the Act state that the Act should not apply retroactively to certain categories of cases. P.L. No. 102-166, §§ 109(c), 402(b), 105 Stat. 1071-1100.[4] One district court has reasoned that § 402(b) and § 109(c) imply that the statute should generally be applied retroactively. Otherwise, the specific sections withdrawing retrospective application would be "meaningless." Stender v. Lucky Stores, Inc., 780 F.Supp. 1302, 1304-05 (N.D. Cal. 1992).

Stender's reasoning rests too much on negative implication. Congress may have wanted to ensure that certain retroactive applications of the statute were barred without intending to reach any general conclusion about the statute's general retroactive application. Mozee, 90-2660, at 9-10. Several Senators stated as much. Fray, 960 F.2d at 1377. Moreover, attempts to extend the Act explicitly

---

[4] Section 402(b) provides that the Act shall not apply retrospectively to the Wards Cove case itself, and § 109(c) provides that the Act's provisions giving the Act extraterritorial reach shall not apply retroactively.

to pending cases failed. President Bush vetoed the Civil Rights Act of 1990, which contained language applying the Act retroactively to pending cases. The Civil Rights Act of 1991 dropped this language and was signed by the President. It may have been that neither the proponents of retroactive application nor the supporters of pure prospectivity could obtain a veto-proof majority concerning the general application of the Act. We do not know, but the relevant point is that the negative implication cannot carry Stender's freight given the swirling confusion surrounding the Act's passage.

Legislative history also sheds little light on whether the Act should apply to pre-enactment conduct. There is little point in reciting speeches made on the floor of Congress concerning retroactivity. These remarks have been summarized before, see, e.g., Fray, 960 F.2d at 1376, and they "contain statements that both favor and disfavor the retroactive application of the 1991 Civil Rights Act to pending cases." Mozee, No. 90-2660, at 12. See also Vogel, 959 F.2d at 598 (noting that Senators Danforth and Kennedy expressed different views concerning retroactivity of Act). We conclude only that members of Congress reached no consensus and

left it to the courts to resolve. Luddington, No. 91-2320, at 4; Mojica v. Gannett Co., Inc., 779 F.Supp. 94, 96 (N.D. Ill. 1991).

We are faced with a deliberately ambiguous statute, and we are asked to resolve political questions Congress was not able to answer. This difficulty is not unfamiliar. It is exacerbated by conflicting lines of authority in the Supreme Court's jurisprudence concerning statutory retroactivity. In Bradley v. Richmond School Board, 416 U.S. 696, 716 (1974), the Supreme Court declared a "general rule that a court is to apply a law in effect at the time it renders its decision." Bradley seems to have adopted this "general rule" "even where the intervening law does not explicitly recite that it is to be applied to pending cases." Id. at 715. By contrast, in Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 471 (1988), the Supreme Court held that the Secretary of Health and Human Services could not promulgate retroactive limits on reimbursable Medicare costs. According to Bowen,

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

Bowen, 109 S.Ct. at 471 (citations omitted). The Supreme Court has acknowledged the "apparent tension" between these two positions, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S.Ct. 1570, 1577 (1990), but it has yet to choose between the two presumptions.

Our own decisions straddle the divide between Bowen and Bradley. Some decisions follow Bowen's "general rule barring retroactivity." Sierra Medical Center v. Sullivan, 902 F.2d 388, 392 (5th Cir. 1990). See also Walker v. United States Department of Housing and Urban Development, 912 F.2d 819, 831 (5th Cir. 1990). Other cases, however, follow Bradley's rule that "a change in law while a case is on direct appeal be given affect." See, e.g., Louviere v. Marathon Oil Co., 755 F.2d 428, 430 (5th Cir. 1985).

Forced as we are to choose a canon without the guidance of controlling authority, we find that § 101 should be construed not to apply to cases arising out of conduct occurring prior to the enactment of § 101. We follow the canon that statutes affecting substantive rights "are ordinarily addressed to the future and are to be given prospective effect only." Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969). See also United States v. Vanella, 619 F.2d

384, 385 (5th Cir. 1980) (quoting Greene v. United States, 376 U.S. 149, 160 (1964)) ("'legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights'"). This canon has a lengthy pedigree, see Kaiser Aluminum, 110 S.Ct. at 1579 (Scalia, J., concurring), reflecting obvious and fundamental concerns of fairness and predictability. Luddington, No. 91-2320, at 4.

In Bennett v. New Jersey, 470 U.S. 632, 638-40, 105 S.Ct. 1555, 1559-60 (1985), the Court held that substantive provisions of amendments to the 1978 Amendments to the Elementary and Secondary Education Act cannot be applied retroactively to funds expended in 1971-72. In distinguishing Bennett from Bradley, the Supreme Court noted that the rule in Bradley was limited by "another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Bennett, 470 U.S. at 639, 105 S.Ct. at 1560. The Bennett Court noted that Bradley concerned allowance of attorney's fees under § 718 of the Emergency School Aid Act, 20

U.S.C. § 1617--a remedial provision--not substantive obligations or rights under a statute. Id.

Section 101 affects substantive antecedent rights. Under Patterson, § 1981 did not prohibit discrimination in promotions before the enactment of § 101. Section 101 extended § 1981 to such discriminatory conduct. We then presume that § 101 does not apply to conduct that occurred before its enactment, absent clear evidence to the contrary. There is no such clear evidence.

We recognize the apparent anomaly that, at the time of UBI's allegedly discriminatory conduct, Patterson had not yet been decided and, under the decisions of many lower courts, § 1981 applied to racial discrimination in promotions. UBI's reliance on the law announced in Patterson, therefore, may be minimal. Some opinions have argued that, given such minimal reliance, the presumption against retroactivity should not operate. Mozee, No. 90-2660, at 37 (Cudahy, J., dissenting); Stender, 780 F.Supp. at 1308; Mojica, 779 F.Supp. at 98.

We are not persuaded. As a matter of law, the rule announced in Patterson applies retroactively to UBI's conduct in

1974. Lavender v. V. & B. Transmissions & Auto Repair, 897 F.2d 805, 806-07 (5th Cir. 1990). Cf. James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991). UBI is just as entitled to the preservation of its substantive interests under this rule as litigants whose conduct occurred after Patterson was decided. Any other holding would require unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating the Civil Rights Act of 1991. We decline to embark on such an inquiry. Luddington, No. 91-2320, at 8.

Having decided that § 101 does not apply retroactively to UBI's conduct, it follows that Johnson's § 1981 claims are governed by the Supreme Court's decision in Patterson. As we have explained, we affirm the district court's finding that Patterson bars Johnson's § 1981 claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

THOMAS JOHNSON,	§	
	§	
Plaintiff	§	
	§	
versus	§	CIVIL ACTION NO. 74-H-435
	§	
UNCLE BEN'S, INC.,	§	
	§	
Defendant.	§	

OPINION ON FINAL JUDGMENT

1. *Procedural History.*

Thomas Johnson brought this class action in 1974 against a rice mill. The complaint alleged that Uncle Ben's, Inc., discriminated against him and similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. § 1981. The complaint was amended in 1975 to all allegations under Title VII of the Civil Rights Act of 1964. Johnson's allegations began from March 28, 1972, and charged discrimination in virtually every term of employment. The

district court, from the bench, ruled in favor of Uncle Ben on all issues. On appeal, the court of appeals affirmed per curiam, but that decision was vacated when the court of appeals reheard the case. The appellate court modified and affirmed in part, reversed in part, and remanded. 628 F.2d 419 (5th Cir. 1980).

The United States Supreme Court vacated the court of appeals decision and remanded the case in light of a then-recent decision. *Uncle Ben's, Inc. v. Johnson*, 451 U.S. 902 (1981), *referring to Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). On remand from the Supreme Court, the court of appeals affirmed in prior opinion and remanded to the district court. 657 F.2d 750 (5th Cir. 1981). The Supreme Court denied Uncle Ben's second petition for a writ of certiorari, and the case was remanded to the district court under the opinion on petition for rehearing in the court of appeals.

2. *Issue on Remand.*

The question on remand is: If promotion or upward mobility occurs at Uncle Ben, do blacks suffer a disparate rejection rate in seeking promotions. Although there is evidence that promotion does

occur at Uncle Ben, the impact Johnson described, taken most favorably to him, does not meet the requirements of the law. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Johnson's case fails on both the Title VII issue and the § 1981 issue.

3. *Background.*

Thomas Johnson, a black male, was employed by Uncle Ben from November 8, 1964, until his discharge on November 7, 1975. In his complaint Johnson alleges that Uncle Ben discriminated against other blacks and him by, among other things, not promoting blacks to higher level jobs.

The job classifications within the Uncle Ben plant are divided into three distinct categories: plant, office hourly, and salaried. This job division is further divided by having ranks within each zone. Plant workers are ranked from a low of one to a high of eleven. Office hourly workers are ranked from one to eight. Salaried workers are ranked from a low of VII to a high of II, with a few sub-divisions in some of the ranks.

Johnson began his employment at a classification of plant 3. From 1967 until 1974, Johnson was employed in a salaried VII position with the research and development division. In 1974 Johnson was laterally transferred to another VII position in the finance division. In 1975 he was promoted to a salaried VI-2, an accounting supervisor.

4. *Title VII - Disparate Impact*

There is sufficient evidence to assume that Uncle Ben promotes within the ranks of its employees. Since promotion does occur, the question becomes whether Johnson suffered a disparate impact in seeking promotions from Uncle Ben. To establish a prima facie disparate impact case, Johnson must identify a specific practice or practices causing imbalance or disparity. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

Johnson presented statistical evidence of a high percentage of minority employees at Uncle Ben in low-level jobs versus a low percentage of minority employees in high-level jobs. While such statistical evidence is some evidence of disparate impact, it must be comprised of an appropriate pool. *Wards Cove Packing Co. v.*

Atonio, 490 U.S. 642 (1989). The proper comparison is between the racial composition of the qualified persons in the relevant labor market and the racial compositions of the jobs at issue. *Hazelwood School Dist. v. U.S.*, 433 U. S. 299, 308 (1977).

A further parameter placed upon the pool is that it be limited to a particular job classification. In this case, the pool must be limited in terms of job zones; hourly plant, office hourly, or salaried. Johnson did not limit his statistical evidence to any one zone, but instead lumped all of the job classifications together. Because the statistical pool is inappropriate, his statistics fail to aid the court in making a finding in his favor.

Even assuming that the statistics were sufficient, this evidence alone does not warrant a finding that Johnson established a prima facie case for disparate impact under Title VII. Evidence that demonstrates that "at the bottom line" there was a racial imbalance in the work force is insufficient to prove a disparate impact case. Statistical correlation is not causation. Johnson must show that Uncle Ben had a specific employment practice that resulted in a disparate impact on minorities. *Watson v. Fort Worth Bank & Trust*, 487 U.S.

977, 993 (1988). Just as an employer cannot escape liability under Title VII by demonstrating that his work force is racially balanced, a Title VII plaintiff does not make out a case of disparate impact by showing that there is racial imbalance in the work force. *Connecticut v. Teal*, 457 U.S. 440, 450 (1982).

Johnson identified three theories of discrimination:

A. Totally subjective system for evaluating candidates for promotion;

B. Irrelevant employment tests; and

C. Emphasis on formal education as a prerequisite for certain jobs.

Johnson did not, however, demonstrate that the disparity he complains of is the result of one or more of the employment practices he is attacking, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. Johnson's failure to show, as part of his prima facie case, that specific elements of Uncle Ben's promotion process has a disparate impact on nonwhites is fatal to his case. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

Assuming Johnson had established a prima facie case of disparate impact, the burden of producing evidence would shift to Uncle Ben to show that its employment practices are based on legitimate business reasons. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Uncle Ben produced evidence that Johnson and other similarly situated black employees were not promoted because of their limited ability to read, requests for demotions, non-shift work requests, lack of interest in changing jobs, and performance shortcomings. Uncle Ben showed that the challenged practices serve plausible, legitimate employment goals. Each of the three different job zones requires distinct qualifications. The court will not decide how Uncle Ben should determine which applicants have the required qualifications for particular jobs and which applicants do not. Johnson offered no evidence to rebut Uncle Ben's business reasons for its employment practices.

5. Section § 1981 Claim.

To establish a § 1981 claim, Johnson must demonstrate that the desired promotion was an opportunity for a new and distinct relationship between himself and Uncle Ben. *Patterson v. McLean*

Credit Union, 491 U.S. 164 (1989). Section 1981 is restricted in its scope to forbidding racial discrimination in the "making and enforce[ment]" of contracts. It is not a general proscription of discrimination in all aspects of contract relations, but rather it is directed at the laws and practices that made disfavored individuals incapable of forming contracts as favored people could. In many of the Black Codes adopted in the rebellious states, blacks were legally proscribed from making a contract for their labor, leaving them especially vulnerable to social and economic pressure. In addition to proving a new contract, Johnson must prove that Uncle Ben intentionally discriminated; proof of merely an adverse effect is not sufficient.

Johnson alleges that Uncle Ben violated § 1981 by refusing him promotions within the company. Johnson's evidence of discrimination is based primarily on wage increases. A claim of wage disparity goes to post-formation conduct of the employment relationship, rather than to the making or enforcing of a new contract. Johnson also showed that employee advancement at Uncle Ben, within each of its three major job groupings, generally is within

that group and rarely involves moving up more than one or two job zones. Movement within one particular job zone is not sufficient change in the employer-employee relationship to make a distinct contract. Johnson himself began in one classification and was promoted to the highest classification, achieving a middle rank in that zone before his termination. In sum, Johnson's allegations of discrimination in Uncle Ben's promotion practices are not actionable under § 1981.

6. *Conclusion.*

Because Johnson was unable to establish a prima facie case under 42 U.S.C. § 1981 or Title VII, a summary judgment for Uncle Ben is appropriate based on the standard that Johnson produced no genuine issues of material fact in this case.

Signed on April 30, 1991, at Houston, Texas.

Lynn N. Hughes
United States District Judge

APPENDIX C

No. 81-2026. Uncle Ben's, Inc., Petitioner v. Thomas Johnson, etc.

November 1, 1982. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

APPENDIX D

D-1

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Plaintiffs-Appellants,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee,

No. 78-1437.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Sept. 30, 1981.

Class action was brought on behalf of class of Black persons and Mexican-American persons alleging that employer had engaged in a variety of discriminatory employment practices. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., dismissed all claims relating to Mexican-Americans, most of the claims relating to Blacks and entered judgment in favor of employer on the remaining issue, and appeal was taken. The Court of Appeals, 628 F.2d 419, vacating opinion, 615 F.2d 917, modified and affirmed in part and reversed in part and remanded. The Supreme Court, 101 S.Ct. 1967, remanded the case for further consideration. On remand, the Court of Appeals, Vance, Circuit

Judge, held that respective burdens of plaintiffs and defendant in Title VII disparate impact case were not affected by Supreme Court decision holding that once a plaintiff has established a prima facie case of disparate treatment burden shifts to defendant to rebut such showing by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason.

Modified and affirmed in part, reversed in part and remanded.

Thomas, District Judge, dissented and filed opinion.

1. **Civil Rights -- 43**

Respective burdens of plaintiffs and defendant in Title VII disparate impact case were not affected by United States Supreme Court decision holding that once a plaintiff has established a prima facie case of disparate treatment the burden shifts to the defendant to rebut such showing by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate nondiscriminatory reason. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. **Civil Rights -- 43**

In Title VII disparate impact cases the plaintiff challenges the practices that are fair in form, but discriminatory in operation and

need not prove intentional discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. **Civil Rights -- 43**

In a Title VII disparate treatment case, plaintiff must show that he has been the victim of an intentional discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. **Federal Courts -- 44(1)**

In making a prima facie case in a Title VII disparate impact suit, plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue; it is not part of the plaintiff's burden to prove absence of a legitimate business reason for the challenged employment practice. Civil Rights of 1964, § 701 et seq., 42 U.S.C.A. § 2000 et seq.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME

COURT OF THE UNITED STATES

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,[*] District Judge.

VANCE, Circuit Judge:

Following the decision of this panel, 628 F.2d 419 (5th Cir. 1980), the Supreme Court, _____ U.S. _____ 101, S.Ct. 1967, 68 L.Ed.2d 290 (1981), remanded this case for further consideration in light of its opinion in *Texas Department of Community Affairs, v. Burdine*, _____ U.S. _____, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). After carefully reviewing our decision, we conclude that our result is not altered by *Burdine*.

In *Burdine*, the Supreme Court clarified the basic allocation of burdens and order of presentation of proof in Title VII cases alleging disparate treatment. These burdens are determined by the factors stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *Burdine* altered this circuit's interpretation of the *McDonnell Douglas* factors in two

---

[*]District Judge of the Southern District of Alabama, sitting by designation.

respects. Prior to *Burdine* we had held once the plaintiff had established a prima facie case of disparate treatment, the burden was upon the defendant to rebut this showing by a preponderance of the evidence. *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980), *cert denied*, _____ U.S. _____, 101 S.Ct. 1701, 681 L.Ed.2d 198 (1981); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977). In addition, we required that the defendant prove that the person actually hired was better qualified than the plaintiff. *Falcon v. General Telephone Co. of the Southwest*, 626 F.2d 369, 378 (5th Cir. 1980), *vacated*, _____ U.S. _____, 101 S.Ct. 1752, 68 L.Ed.2d 234 (1981); *East v. Romaine, Inc.*, 518 F.2d 332, 339-40 (5th Cir. 1975). In *Burdine* the Court rejected our interpretation of the defendant's burden:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the

introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

Id., _____ U.S. at _____, 101 S.Ct. at 1094 (footnote omitted). While the Court cautioned that the defendant's explanation of its legitimate reasons must be clear and reasonably specific, *id.*, _____ U.S. at _____, 101 S.Ct. at 1096, it made clear that the defendant carries a burden of production, not a burden of persuasion.

The Supreme Court also stated that the employer need not demonstrate that the person actually hired was better qualified than the plaintiff. If the employer produces evidence that on the basis of legitimate, nondiscriminatory criteria the person chosen for the job possesses qualifications equal to those of the plaintiff, he rebuts the prima facie case. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* _____U.S. _____, 101 S.Ct. at 1097.

[1,2] While *Burdine* thus affects the burdens of the parties in Title VII disparate treatment cases, it does not address Title VII

disparate impact cases.[1/] Indeed, *Burdine* explicitly affirms the distinction between the two kinds of cases, noting that "the character of the evidence presented" differs in the two branches of Title VII law. _____ U.S. at _____, 101 S.Ct. at 1093 n.5.[2/] In disparate impact cases the plaintiff challenges "practices that are fair in form, but discriminatory in operation," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) and need not prove intentional discrimination, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, L.Ed.2d 396 (1977). The Supreme Court has described the burdens in a disparate impact case as follows:

[1/]We note that the reason given by the Supreme Court for granting certiorari in *Texas Dep't. of Community Affairs v. Burdine*, _____ U.S. _____, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), was to resolve a conflict among the circuits. *Id.*, _____ U.S. at _____, 101 S.Ct. at 1093. The only cases cited by the Supreme Court as evidence of this conflict were cases involving claims of disparate treatment. *Id.*, _____ U.S. at _____, 101 S.Ct. at 1093 n.4.

[2/] *See also id.*, _____ U.S. at _____, 101 S.Ct. at 1094 n.8, where the Court stated that the allocation of burdens set forth in *Burdine* is suited to the task of "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." Because no question of intentional discrimination arises under the disparate impact theory, *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977), the allocative scheme in *Burdine* was not formulated to develop the factual inquiry in a disparate impact case.

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs v. Duke Power Co., supra,* at 432, [91 S.Ct., at 854]. If the employer *proves* that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" [citations omitted] [emphasis added].

Dothard v. Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

The respective burdens in a disparate impact case are thus governed by clear and recent Supreme Court precedent unaltered by *Burdine*. We are, of course, bound by this precedent and by the statements of our own court left unaffected by *Burdine*. *See James*

v. Stockham Valves & Fittings Co., 559 F.2d 310, 330 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Rowe v. General Motors Corp.*, 457 F.2d 348, 354-55 (5th Cir. 1972).[3/]

[3,4] That the burden upon the defendant in rebutting a prima facie case should very in the two branches of Title VII law is understood by looking to the nature of the prima facie case and the plaintiff's ultimate burden. In a disparate treatment case, the plaintiff

---

[3/]Since the decision of the Supreme Court in *Burdine* two district courts in this circuit have expressly held that *Burdine* does not affect fifth circuit precedent in the area of disparate impact. *Vuyanich v. Republic Nat'l Bank*, _____ F. Supp. _____, 50 U.S.L.W. 2096 (N.D.Tex. Aug. 4, 1981); *Hefferman v. Western Elec. Co.*, 510 F. Supp. 712, 716 (N.D.Ga. 1981). Post-*Burdine* cases from the second and tenth circuits have not altered the rule contained in the pre-*Burdine* cases from those circuits which shifts the burden of persuasion to the defendant in disparate impact cases under Title VII. *Compare Teal v. Connecticut*, 645 F.2d 133, 136 n.5 (2d Cir. 1981) *and Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) (post-*Burdine* cases) with *Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n*, 490 F.2d 387, 393 (2d Cir. 1973) *and EEOC v. Navajo Ref. Co.*, 593 F.2d 988, 990 (10th Cir. 1979) (pre-*Burdine* cases). But cf *NAACP v. Medical Center, Inc.*, _____ F.2d _____ at _____-_____ No. 80-1893, slip op. at 22-27 (3d Cir. June 19, 1981) (en banc) (*Burdine* affects allocation of proof in disparate impact case under Title VI). Additionally, one panel of this circuit has properly refrained from overturning a line of fifth circuit precedent which allocated the burden of persuasion to school districts in a certain class of cases arising under Title VI of the Civil Rights Act. *Castaneda v. Pickard*, 648 F.2d 989, 994 n.2 (5th Cir. 1981).

must show that the has been the victim of intentional discrimination. "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). As the Court has noted, "[E]stablishing a prima facie case of disparate treatment is not onerous." *Burdine*, _____ U.S. at _____, 101 S.Ct. at 1094. In making a prima facie case in a disparate impact suit, however, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue. It is not part of the plaintiff's burden to prove absence of a legitimate business reason for the challenged practice. Knowledge of a legitimate business reason is uniquely available to the employer who is accordingly required to persuade the court of its existence by a preponderance of the evidence.

The present case involves charges of disparate impact. On remand, the respective burdens of plaintiffs and defendant are thus unaffected by *Burdine*. We note that our decision in this case made reference to the standards of rebuttal in Title VII disparate treatment

cases which, of course, have now been altered by *Burdine*. This language, however, was not essential to our opinion. The principles governing disparate impact cases have been clearly established by the Supreme Court and by the opinions of this circuit. *Burdine*, which dealt with a wholly different type of discrimination suit, in no way diminishes the vitality of these decisions.

We therefore remand for further proceedings in accordance with our prior opinion on petition for rehearing.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

DANIEL H. THOMAS, District Judge, dissenting:

The majority has determined that this case is unaltered by the decision of the United States Supreme Court in *Burdine*. This decision is based on the distinction between a case of disparate treatment and a case of disparate impact. The question which arises is what burden is placed on the employer after the plaintiff puts forth a *prima facie* case of discrimination.

Prior to *Burdine*, as the majority has stated, in a disparate treatment case the employer had to rebut the *prima facie* case by a preponderance of the evidence. After *Burdine*, the employer need

only bear the burden of production of evidence of a legal reason for his action. Thus the burden of the employer is a burden of production rather than a burden of proof as required by this Circuit prior to *Burdine*.

In a disparate impact case, the burden placed upon the employer to rebut a *prima facie* case is a showing that the questioned standard to practice has a manifest relationship to the employment. The majority has carefully selected and emphasized language from a Supreme Court case which allegedly "describes the burden in a disparate impact case." The majority emphasizes the word "proves" in the statement "(i)f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices . . . would also 'serve the employer's legitimate interest . . . '" This wording would seem to indicate that the employer must assume the burden of proof in any disparate impact case, and this is the precedent in this Circuit to date.

I believe, however, that in referring this Court to *Burdine*, the Supreme Court did not wish this Court to distinguish a case involving disparate treatment, such as *Burdine*, and a case involving disparate impact, such as this case. The majority is correct in pointing out that

Burdine acknowledges and affirms a distinction between the two types of cases. The Supreme Court in *Burdine* "set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." The Court then footnoted that "(w)e have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." The majority has taken these statements together with the prior Supreme Court statement regarding "proof" required of the employer and has determined that "(t)he respective burdens in a disparate impact case are thus governed by clear and recent Supreme Court precedent unaltered by *Burdine*." If such be the case, there was no reason for the Supreme Court to refer this Court to *Burdine*. I believe that the burden of proof in all cases of disparate treatment and disparate impact remains with the plaintiff and that only the burden of production shifts to the employer. The "character of the evidence" required of the employer in each type of case will vary as do the factual situations, but the "basic allocation of burdens and order or presentation of proof" remains the same in each type of case.

In regard to this case, however, I do not find the necessity of determining this "burden" in regard to all issues other than discrimination against blacks with respect to promotions. As I stated in my previous dissent, I conclude that the district court did not err in holding that the plaintiffs failed to establish a *prima facie* case in regard to these issues. I, therefore, am of the opinion that no burden needed to be met by the employer in regard to these issues.

As previously stated in my original dissent, I conclude that the district court's findings regarding the lack of discrimination in the promotion of blacks was not clearly erroneous. The majority in its original opinion held that the clearly erroneous standard of review did not apply to findings based on an erroneous view of legal principles. The majority then undertook an "independent analysis of the record in light of the correct legal standards."

The district court determined that plaintiffs' statistical evidence and testimonial evidence made out a *prima facie* case of discrimination against blacks on the promotion issue, but held that this had been rebutted by both the absence of discriminatory explanations of the status quo and further determined that plaintiffs did not introduce evidence that these explanations were pretextual.

I would affirm the judge of the district court outright. I therefore respectfully dissent from the modification and remand of the majority opinion.

APPENDIX E

E-1

SUPREME COURT OF THE UNITED STATES

No. 80-1420

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually and on behalf of all others similarly situated

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U.S. _____ (1981).

IT IS FURTHER ORDERED that the petitioner, Uncle Ben's, Inc., recover from respondent Two Hundred Dollars ($200.00) for its costs herein expended.

April 20, 1981

APPENDIX F

THOMAS JOHNSON, INDIVIDUALLY; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee,

No. 78-1437,

UNITED STATES COURT OF APPEALS,

Fifth Circuit,

Oct. 17, 1980.

Class action was brought on behalf of class of black persons and Mexican-American persons alleging that employer had engaged in a variety of discriminatory employment practices. The United States District Court for the Southern District of Texas, 615 F.2d 917, Ross N. Sterling, J., dismissed all claims relating to Mexican-Americans, most of the claims relating to blacks and entered judgment in favor of employer on the remaining issue, and appeal was taken. The Court of Appeals, Vance, Circuit Judge, held that: (1) trial court adopted an erroneous notion of controlling legal principles regarding use and role of statistics in employment discrimination case; (2) dismissal of claims regarding Mexican-

Americans would be without prejudice where trial court failed to rectify the situation when it became apparent that plaintiffs did not adequately represent class of Mexican-Americans; and (3) case would be remanded for preparation of new findings on discriminatory impact with regard to promotion of blacks.

Modified and affirmed in part; reversed in part and remanded.

Daniel Holcombe Thomas, District Judge, filed dissenting opinion.

1. Civil Rights 44(1)

Where gross statistical disparities can be shown, they alone may constitute prima facie proof of pattern of practice of discrimination in employment.

2. Civil Rights 43

Plaintiffs in a class action employment discrimination case do not need to prove knowing and intentional discrimination to prove a disparate impact case nor must plaintiffs prove a racially disproportionate impact with complete mathematical certainty.

3. **Federal Courts 850**

Clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles.

4. **Federal Courts 858**

District court's findings in employment discrimination case, which were based on erroneous notion of controlling legal principles regarding use and role of statistics, were not entitled to any deference on appeal.

5. **Civil Rights 44(1)**

There was no substantial evidence before court of discriminatory employment practices against Mexican-Americans during period covered by the suit and therefore trial court properly dismissed claims regarding upon Mexican-Americans.

6. **Federal Procedure 173**

In class action, trial court has duty to supervise plaintiffs' presentation to safeguard rights of class being represented. Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A.

7. Federal Civil Procedure 173, 176, 1827

When it became apparent that plaintiffs, who brought class action on behalf of class of black persons and Mexican-American persons alleging discriminatory employment practices, did not adequately represent Mexican-Americans, trial curt should have taken action such as dividing certified class into separate subclass for Mexican-American members, decertifying that class, or certifying a second class and to remedy trial court's failure in such respect, trial court's dismissal of all claims regarding Mexican-Americans would be without prejudice. Fed. Rules Civ. Proc. Rule 23(c)(4), 28 U.S.C.A.

8. Civil Rights 43, 44(4)

Plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks with regard to promotions and therefore burden shifted to employer to go forward with evidence as to either existence of legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence or total unacceptability of plaintiff's statistical proof. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

9. Civil Rights 44(4)

If employer ordinarily employed individuals for upper level positions by hiring laterally from outside company, then relevant statistical comparison for determining validity of allegations that employer discriminated against blacks in promotion practices would be between black/white ratio in each of employer's jobs and general or qualified outside labor force and if employer promoted from within, statistical comparison would be against employer's internal work force. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

10. Civil Rights 46

In class action alleging that employer discriminated against blacks with regard to promotions, trial court erred in tacitly approving part of employer's promotion system which was based on use of subjective supervisory evaluations made by groups of white supervisors.

11. Civil Rights 2

Title VII was specifically designed to remove artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of racial or other

impermissible classification. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

12. Civil Rights 9.13

Educational requirement for a job is lawful if it s required by business necessity and valid under EEOC's uniform guidelines on employee selection procedures. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS[*], District Judge.

VANCE, Circuit Judge:

The motion for rehearing is granted, 615 F.2d 917 (5th Cir.). This panel's unpublished opinion of April 11, 1980, 615 F.2d 917 (5th Cir.), is vacated in its entirety.

---

[*]District Judge of the Southern District of Alabama, sitting by designation.

I.

This appeal challenges the district court's disposition of a class action brought pursuant to section 1981, 42 U.S.C. § 1981, and Title VII, 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by Defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case showing discriminatory treatment of Mexican-Americans and on all but one issue regarding blacks, and, therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. On that one issue, the district court found that plaintiffs had established a prima facie case of discrimination against blacks in promotion, but ultimately ruled in favor of Uncle Ben's on this point as well.

II.

The district court adopted and applied an erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case. In discussing the promotion issue, the district court stated,

> If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that *what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.* We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. *The law does not say that the defendant shall not violate the rules of mathematical probability.*
>
> A Business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and jobs involved to make such decisions.

(Emphasis added.) This standard is incorrect.

[1,2] Statistics as to racial composition of the defendant's work force serve an important role in judging employment discrimination cases. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 543-44 (5th Cir. 1980). "Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736,2741, 53 L.Ed.2d 768 (1977). *See also Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d at 544; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 225 & n.34 (5th Cir. 1974). The class plaintiffs do not need to prove knowing and intentional discrimination to prove a disparate impact case. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335 n.15, 97 S.Ct. at 1854-1855 n. 15; *Scott v. City of Anniston*, 597 F.2d 897, 898 (5th Cir. 1979), *cert. denied* _____ U.S._____, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). Nor must the plaintiffs prove a racially disproportionate impact with "'complete mathematical certainty.'" *James v. Stockham*

Valves & Fittings Co., 559 F.2d 310, 337 (5th Cir. 1977), *cert denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) (quoting *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission,* 490 F.2d 387, 393 (2d Cir. 1973)).

[3, 4] The clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles. *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 n.20 (5th Cir. 1974). The district court's findings based on its misunderstanding of this legal standard are entitled to no deference. We must undertake an independent analysis of the record before us in light of the correct legal standards.

III.

Plaintiffs alleged that between 1972 and the institution of this suit in 1974, and as far back as 1960,[1/] Mexican-American workers,

---

[1/]Prior to the effective date of Title VII, July 2, 1965, can be consideerd under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. Secondly, this court specifically

(continued...)

who comprise nine percent of Houston's labor market, constituted only four percent of Uncle Ben's employees. This gross disparity between Uncle Ben's workforce and the relevant labor market, which is statistically significant, ordinarily would satisfy plaintiff's initial burden of establishing a prima facie case of hiring discrimination. *Hazelwood School District v. United States*, 433 U.S. at 307-08, 97 S.Ct. at 2741-2742; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 225 & n.34. Despite Uncle Ben's contrary claims, we ascribe no affirmative legal significance to Uncle Ben's' increase in the number of its Mexican-American employees subsequent to the filing of this suit. *International Brotherhood of Teamsters v. United States*, 431, U.S. at 341-42, 97 S.Ct. at 1857-1858; *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385-86.

[1/](...continued)
explained in *United States v. Jacksonville Terminal*, 451 F.2d 418, 441 (5th Cir. 1971), *cert. denied* 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), and *affirmed in Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th cir. 1973), that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects. *See United States v. Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970). *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 218 n. 10. *See also Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n. 15, 97 S.Ct at 2742-2743 n. 15, 53 L.Ed.2d 768 (1977)

This case nevertheless raises a difficult problem involving whether there was evidence of Uncle Ben's substantial underutilization of Mexican-Americans at the close of plaintiffs' direct case. Uncle Ben's asserts that the district court properly dismissed plaintiffs' allegations of discrimination against Mexican-Americans because at the close of plaintiffs' case the record was devoid of evidence supporting such allegations. We agree.

[5] Plaintiffs' case regarding Mexican-Americans rested on the testimony of their expert, Richard Alfred Tapia, to the effect that Uncle Ben's substantially underutilized Mexican-Americans. On cross examination, however, Dr. Tapia disclosed that he had relied on statistics relating to 1975, more than a year after suit was filed. He conceded that he had no information regarding the number of Mexican-Americans employed and terminated during the period covered by the suit. He conceded further that the basis for his opinion did not include prior interviews with any of Uncle Ben's' employees or an examination of any of the company's personnel files. Dr. Tapia relied instead on Uncle Ben's' answers to interrogatory number 13 alone, which Dr. Tapia acknowledges he incorrectly assumed to relate to 1974. In fact, the information

related to September 12, 12975. This interrogatory answer was introduced into evidence. Plaintiffs' counsel failed to offer other available evidence that contained the 1974 date that would have established a prima facie case of discrimination. Because there was no substantial evidence before the court of discrimination during the period covered by the suit, the district court correctly dismissed the claim regarding Mexican-Americans. Plaintiffs' counsel never sought to have the claim reopened when the availability of the needed data became evident.

IV.

The district court originally, and at the time quite correctly, determined that plaintiff would adequately represent the certified class of blacks and Mexican-Americans. At trial, however, representation of the class of Mexican-Americans was not adequate. The thrust of plaintiff's direct case concerned the situation involving black employees. Although this may well have been necessary on the issue of promotion considering the small number of Mexican-Americans employed by Uncle Ben's, plaintiffs' preoccupation with the issue of black promotion seemingly led them to omit to introduce

into evidence the number of Mexican-Americans hired by Uncle Ben's.

[6, 7] Under Rule 23 of the Federal Rules of Civil Procedure, the trial court has a duty to supervise plaintiffs' presentation to safeguard the rights of the class being represented. *Grigsby v. Northern Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978); *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864-65 (5th Cir. 1977). When it became apparent that plaintiffs did not adequately represent the Mexican-Americans, the trial court should have taken action such as dividing the certified class into a separate subclass for the Mexican-American members, *see* Fed.R.Civ.P. 23(c)(4), decertifying that class, or certifying a second class. To remedy the trial court's failure in this respect we now hold that dismissal of all claims regarding Mexican-Americans is without prejudice. This judgement does not have res judicata effect against them in light of plaintiffs' total failure adequately to represent them. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961) ("the judgement in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation");

Grigsby v. North Mississippi Medical Center, 586 F.2d at 471-62; *Gonzales v. Cassidy*, 474 F.2d 67, 73-75 (5th Cir. 1973).

V.

Plaintiffs' case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels.[2/] Plaintiffs further alleged that Uncle Ben's filled its better jobs generally by promoting employees from within the firm rather than making lateral hires from without. Blacks, therefore, tended to remain in those low paying, entry level positions while similarly situated whites advanced upward from such positions.

[8] The district court correctly determined that plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks on the promotion issue.

[2/]Plaintiffs' demonstrated, *inter alia*, that of the 172 plant hourly positions, 118 such positions were held by blacks (68.6%). In the next four higher zones, blacks held 30 of the 67 positions (44.8%). Taking higher plant hourly pay zones into account as well as all office hourly jobs and the salaried jobs, blacks represented 35.8% of Uncle Ben's total work force. The overall pattern appeared to be one of blacks being clustered in the lowest paying jobs. Even those few blacks who entered the generally more desirable salaried jobs tendered to be clustered in the least remunerative and responsible jobs at those levels.

E.g., Watkins v. Scott Paper Co., 530 F.2d 1159, 1185-86 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Rowe v. General Motors Corp.*, 457 F.2d 348, 357 (5th Cir. 1972). Uncle Ben's then had the "'onus of going forward with the evidence and the burden of persuasion,'" *James v. Stockham Valves & Fittings Co.*, 559 F.2d at 330 (quoting *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972)), as to either the existence of "legitimate, nondiscriminatory reasons for [its] action by a preponderance of the evidence," *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977), or the total unacceptability of plaintiffs' statistical proof, *see EEOC v. Datapoint Corp.*, 570 F.2d 1264, 1269 (5th Cir. 1978) ("statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion"); *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 658 (5th Cir. 1976), cert. denied, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1371.

The trial court held that plaintiffs' prima facie case had been rebutted by Uncle Ben's evidence showing both the absence of discriminatory impact and the presence of "legitimate,

nondiscriminatory" explanations for the status quo. Plaintiffs did not introduce evidence that these explanations were pretextual.

The findings regarding the absence of discriminatory impact are, in pertinent part, as follows:

> 11. Plaintiff also introduced through Dr. Tappia [sic] evidence of differences in upward mobility-wage increases received by Defendant's black and white employees. . . . Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, establish discriminatory treatment of Defendant's black employees.
>
> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. . . . Further, . . . the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are

included. . . . Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes of upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at defendant's facilities and the necessary requirements for those jobs, and based upon the 1970 United States Census availability data, the Court finds the Defendant employed an

equitable number of blacks in view of their availability within the Houston SMSA.

* * * *

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees.

The district court's findings concerning legitimate, nondiscriminatory reasons are, in relevant part, as follows:

15. The large number of black employees employed within defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through on-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

On the discriminatory impact issue, Uncle Ben's persuaded the district court that the black/white ratio in each of Uncle Ben's job levels should be compared to the black/white ratio in comparable jobs in the Houston SMSA, and not compared to the black/white ratio in the relevant lower job level(s) at Uncle Ben's. The district court accepted this argument and, because of the favorable statistical comparisons between Uncle Ben's at various levels and similar

Houston SMSA job levels, found that Uncle Ben's had not violated Title VII.

[9] The dispositive issue is whether Uncle Ben's ordinarily employs individuals for upper level positions by hiring laterally from outside the company or by promoting from within. If it hires laterally, the relevant comparison is to the general or qualified outside labor force. If Uncle Ben's fills jobs by promotion, the relevant comparison, as we recognized in *James v. Stockham Valves & Fittings Co.*, 559 F.2d at 331, 341, is the company's internal work force. *Accord, Hereford v. Huntsville Board of Education*, 574 F.2d 268, 272-273 (5th Cir. 1978). The applicability of *James* in any given case turns on whether vacancies in non-entry level positions are or could be filled by promotion. If the vacant positions ordinarily are filled by lateral hires or hiring from among graduates or relevant educational programs, then the rigid *James* rule is inapplicable. *See Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21, 94 S.Ct. 1323, 1333-11134, 39 L.Ed.2d 630 (1974); *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 n.6 (5th Cir. 1974).

The difficulty is that most cases fall between these extremes of exclusive promotion and of exclusive non-promotion. As a

general matter, however, cases are dealt with in terms of the extreme to which they most closely accord. In addition, the necessity of non-promotions in certain jobs -- or even in the majority of jobs within a company -- should not foreclose an inquiry at trial into whether the remaining jobs filled by promotion are discriminatorily filled.

The district court frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions. The trial court's findings 11-13 and 19 suggest that promotions occur. Findings 14-16 suggest that no promotions are made from Plant to Office. Yet neither set of findings is necessarily incorrect; Uncle Ben's may fill some of its positions by promotions while it must fill other positions from outside the company. If so, it is insufficient to know that blacks constitute 141 of Uncle Ben's 394 employees. We must know how many of those 394 employees hold jobs that ordinarily cannot be filled by promotion to decide the question of discriminatory impact.

The district court must, therefore, prepare new findings on discriminatory impact. Findings of fact 12 and 14, for example, are useless to the extent they incorporate or commingle facts about lateral

hiring. First, the new findings must determine the number of Uncle Ben's jobs that were filled by promotion and the number that were filled by hiring from the outside of the Uncle Ben's work force. In essence, the absence or presence of blacks in lateral hire positions is generally irrelevant to the question of discrimination in promotion. Because the issue of discrimination in lateral hiring for desirable positions at Uncle Ben's has not been properly raised, the district court must excise facts germane to that issue from its assessment of discrimination in promotion. Second, the district court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the district court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions. Given the peculiar nature of this case, on remand the district court will not abuse its discretion if it allows

plaintiffs and Uncle Ben's an opportunity to clarify and supplement their original presentations.

The two issues of access-promotion and lateral hiring (including hiring from schools) -- should be kept separate in scrutinizing statistical analyses. *Cf. Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1372-73 (statistical consequences of unvalidated testing should not be manipulated by including effects of independent transferal policy). Assuming that Uncle Ben's only hired whites for non-promotion positions, only similarly situated black applicants have suffered discrimination. The class of black laborers who are striving or would be striving but for discrimination, *International Brotherhood of Teamsters v. United States*, 431 U.S. at 363-64, 97 S.Ct. at 1868-1869; *James v. Stockham Valves & Fittings Co.*, 559 F.2d at 341-42, for a promotion from within the company to a promotion job may not have been injured. Similarly, if lateral hires were exclusively black, this would provide little solace for the class of black laborers, and would not mitigate any discrimination suffered in promotions.

VI.

[10] The trial court erred in tacitly approving the part of Uncle Ben's promotion system that is based on the use of subjective supervisory evaluations. We have repeatedly held that subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination. *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385; *James v. Stockham Valves & Fittings Co.*, 559 F.2d at 345; *Rowe v. General Motors Corp.*, 457 F.2d at 359.

Uncle Ben's subjective promotion system substantially embodies the mechanisms that we invalidated in *Rowe*:

(i) The foreman's recommendation is the indispensable single most important factor in the promotion process.

(ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)

(iii) Those standards which were determined to be controlling are vague and subjective.

(iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.

(v) There are no safeguards in the procedure designed to avert discriminatory practices.

Id. at 358-59 (footnote omitted). *See Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (5th Cir. 1976) (§ 1981 standard). These *Rowe* vices are not undone here simply because Uncle Ben's has made certain changes about the time this suit was instituted. Nor is *Rowe* avoided because subjective decisions are made by a group instead of an individual. *See Robinson v. Union Carbide Corp.*, 538 F.2d at 661-62. This is not, moreover, a case of permissible subjectivity. *Davis v. Board of School Commissioners*, 600 F.2d 470, 475 (5th Cir. 1979), *modified on other grounds*, 616 F.2d 893 (5th Cir. 1980).

In all likelihood, the district court did not mean to approve Uncle Ben's subjective promotion system. Rather, it probably concluded that *Rowe* was inapplicable because no resulting substantial discrimination existed. *Hester v. Southern Ry.*, 497 F.2d at 1381. We hold that Uncle Ben's subjective promotion system fails, unless

the district court concludes in light of our instructions in Part V that blacks suffered no discriminatory impact in promotion.

VII.

If the district court finds on remand that a discriminatory impact existed, it must then reexamine its conclusion regarding whether Uncle Ben's educational requirements have been validated. Should such inquiry be necessary, it must be made in light of the following standards and principles.

[11, 12] Title VII was specifically designed to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). *Cf. Miller v. International Paper Co.*, 408 F.2d 283, 294 (5th Cir. 1969) ("The ethic which permeates the American Dream is that a person may advance as far as his talents and his merit will carry him.") An educational requirement for a job is lawful if it is required by "business necessity," *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. at 853-854; *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 899-900 (5th Cir.) *cert. denied*, 439 U.S. 835, 99 S.Ct. 118,

58 L.Ed.2d 131 (1978), and valid under the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979); *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). *See generally Griggs v. Duke Power Co.*, 401 U.S. at 431-33, 436, 91 S.Ct. at 853-854.[3/] An educational requirement is not a measure of probable performance for many jobs at Uncle Ben's. *See Watkins v. Scott Paper Co.*, 530 F.2d at 1181-82 & n. 30. This test of "justified business necessity" may, of course, be relevant, leaving aside the question of discriminatory impact, to the question on remand whether certain jobs are filled by promotion or lateral hiring.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. In the course of rendering its decision the district court stated "that what has transpired . . . at

---

[3/]In certain cases, however, if an employer has never attempted to validate an education requirement criterion, this failure to validate compels the conclusion that the requirement is invalid. *Watkins v. Scott Paper Co.*, 530 F.2d at 1182 n. 31.

Uncle Ben's could not have statistically have [sic] happened by chance," yet "[t]he law does not say that the defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the Court's confusion as to the role of statistics in cases of this sort, *e.g.*, *Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 544 (5th Cir. 1980), I would affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous. I would further conclude that the district court did not err in holding that the plaintiffs had failed to establish a *prima facie* case on all issues other than discrimination against blacks with respect to promotions. I would affirm the ruling of the district court.

I dissent.

APPENDIX G

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 78-1437

THOMAS JOHNSON, Individually, etc.

Plaintiff-Appellant,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(APRIL 11, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS[*], District Judge.

---

[*]District Judge of the Southern District of Alabama, sitting by designation.

PER CURIAM:

This appeal challenges the district court's disposition of a class action brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case of discriminatory treatment on any issue concerning the Mexican-Americans and on all but one issue regarding the blacks; therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. The district court found that plaintiffs has established a prima facie case of discrimination in the promotion of blacks but ultimately ruled in favor of Uncle Ben's on this issue. We affirm.

In the course of rendering its decision, the district court stated "that what has transpired . . . at Uncle Ben's could not have

statistically have [*sic*] happened by chance," yet "[t]he law does not say that defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the court's confusion as to the role of statistics in cases of this sort, e.g., *Fisher v. Proctor & Gamble Mfg. Co.*, . . . F.2d . . . (5th Cir. 1980) [slip op 3737, 3757], we affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous. We further conclude that the district court did not err in holding that plaintiffs had failed to establish a prima facie case on all issues other than discrimination against blacks with respect to promotions.

AFFIRMED.

APPENDIX H

In The
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS JOHNSON, Individually
and on behalf of all others
similarly situated

v.

UNCLE BEN'S, INC.

CIVIL ACTION NO. 74-H-435

Nelkin & Nelkin (Carol Nelkin), Houston, Texas,
attorneys for Plaintiff.

Fulbright & Jaworski (Robert S. Bambace and
Philip J. Pfeiffer), Houston, Texas,
attorneys for Defendant.

January 11, 1978

MEMORANDUM:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's evidence in this case was in large part a presentation of statistical analyses of various aspects of Defendant's employee-employer relationships. Defendant's statistical presentation tended to refute that of Plaintiff in some ways. However, references in these findings of fact concerning statistical significance should not

be taken as a dilution of what was announced from the bench as the basis for decision at the end of the evidence:

> "First, on statistics. If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says that the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability.
>
> "A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.
>
> "Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion."

FINDINGS OF FACT

1. Plaintiff Thomas Johnson was employed by Defendant Uncle Ben's, Inc. from November 8,, 1964 until his discharge on November 7, 1975. Plaintiff is black.

2. Plaintiff was terminated for violating an established policy of Defendant's regarding the obligation of employees to

conduct themselves in accordance with standards of common decency and morality, and specifically prohibiting the making of indecent remarks or advances. In this regard, Plaintiff was terminated for improper conduct on his part as a supervisor *vis-a-vis* a Company employee over whom he exercised supervisory authority. Plaintiff's race was not a factor in his discharge.

3. The hourly job zones within the Plant, which is where Plaintiff was initially employed, range from Zone 1 to Zone 11, with the job classifications within Zone 11 being the highest rated hourly jobs within the Company. In ascending order of pay, Defendant's Salaried Job Zones range from Zone VII to Zone II, with certain Salaried Job Zones having subgroups such as Zone VI which is broken down into Zones VI-1 and VI-2. Defendant also has a separate job zone structure for office hourly positions, with the Office Hourly Job Zones utilized by Defendant, in ascending order of pay, ranging from Zone 1 through Zone 8.

4. During the period of his employment, November, 1964 to November, 1975, Plaintiff advanced from a job classification within Plant Hourly Job Zone 3 to Accounting Supervisor which is a Salaried Job Zone VI-2 position. From 1967 until 1974 Plaintiff

was employed in a Salaried Zone VII position within the Research & Development Division. On or about March 12, 1974, prior to the filing of this action, Plaintiff accepted a transfer from Defendant's Research & Development Division to its Service and Finance Division. The Transfer offer was in response to Plaintiff's request.

5. Although Plaintiff received no promotions during the seven year period he was employed at a Salaried Job Zone VII position in Research & Development, the Court finds that Plaintiff was not treated differently than similarly situated white employees.

6. Although Plaintiff complains that several employees within the Research & Development Division did receive promotions during the time he served in a Salaried Zone VII position, there is no evidence that Plaintiff's race was a factor in any of these promotion decisions or that Plaintiff was qualified for the promotions in question.

7. Defendant did not discriminatorily fail to promote Plaintiff or otherwise discriminate against Plaintiff in his employment opportunities on the basis of his race.

8. By Order dated September 12, 1975, this action was certified as a class action maintainable by Plaintiff in his own behalf

and in behalf of all other black and Mexican-American persons who have been employed or are employed or may in the future be employed by Defendant.

9. The Court finds that Defendant's policies, practices, customs and usages at its facilities have not discriminated against Plaintiff and the class he represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharge and other terms and conditions of employment.

10. Plaintiff failed to establish a pattern or practice of Defendant treating Mexican-American employees and/or applicants for employment differently than white employees and/or applicants. Plaintiff's expert witness, Dr. Richard Tapia, testified that Mexican-Americans represented 8.9% of the Houston Standard Metropolitan Statistical Area ("SMSA") labor force. While the Court finds that Mexican-Americans do represent 8.9% of the labor force within the Houston SMSA, based upon the 1970 United States Census, the Court further finds that underemployment of Mexican-Americans within Defendant's labor force was not established.

11. Plaintiff also introduced through Dr. Tapia evidence of differences in upward mobility -- wage increases received by Defendant's black and white employees. See Plaintiff's Exhibit No. 8. Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, *establish discriminatory treatment of Defendant's black employees.*

12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in

black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes or upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at Defendant's facilities and the necessary requirements for those jobs, and based on the 1970 United States Census availability data, the Court finds the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA.

15. The large number of black employees employed within Defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through one-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no

statistically significant difference in the treatment of Defendant's black and white employees. See Defendant's Exhibit Nos. 36, 37, 38, 39, 40, 41 and 42 (a-c).

CONCLUSIONS OF LAW

1. Any finding of fact hereinbefore made which constitutes a conclusion of law is hereby adopted as a conclusion of law.

2. The Court finds that Plaintiff Thomas Johnson failed to prove that he was discharged because of his race, or because he filed charges with the EEOC or because he instituted and failed to dismiss these legal proceedings against Defendant, or that his discharge in any manner violated Title VII or § 1981.

3. The Court finds that Defendant Uncle Ben's, Inc. did not unlawfully fail to promote Plaintiff Thomas Johnson or otherwise discriminate against him in his employment opportunities on the basis of his race in violation of either Title VII or § 1981.

4. The Court finds that Defendant Uncle Ben's, Inc.'s employment policies, practices, customs and usages at its various facilities are non-discriminatory and have not resulted in discrimination against Plaintiff Thomas Johnson and the class he

represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharges and other terms and conditions of employment in violation of either Title VII or § 1981.

5. The Court further finds that all costs of suit should be and hereby are taxed against Plaintiff.

DONE at Houston, Texas, this 11th day of January, 1978.

Ross N. Sterling

United States District Judge

92-737

FILED
OCT 27 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT Of PETITION FOR A WRIT OF CERTIORARI

STUART M. NELKIN
CAROL NELKIN

Attorneys for Petitioner
NELKIN & NELKIN, P.C.
5417 Chaucer
P.O. Box 25303
Houston, Texas 77265
(713) 526-4500 (tel)
(713) 526-8915 (fax)

October 23, 1992

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

CERTIFICATE OF SERVICE 3

TABLE OF AUTHORITIES

Page

CASES

Davis v. City and County of San Francisco,
1992 U.S. App. Lexis 24836
(October 6, 1992) 1, 2

Johnson v. Uncle Bens, Inc.,
965 F.2d 1363 (5th Cir. 1992) 2

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT Of PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Since the filing of the Petition for a Writ of Certiorari in this matter, the United States Court of Appeals for the Ninth Circuit has rendered its decision in Davis v. City and County of San Francisco, 1992 U.S. App. Lexis 24836 (October 6, 1992).

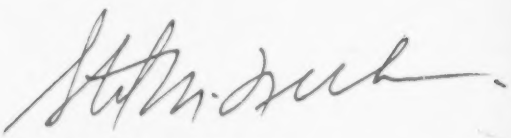
In Davis, the Ninth Circuit held that "Congress intended the courts to apply the Civil Rights Act of 1991 to cases pending at the time of its enactment and to pre-act conduct still open to challenge after that time." 1992 U.S. App. Lexis 24836, *49.

In reaching its conclusion, the Ninth Circuit expressly declined to follow the non-retroactivity holding of the Fifth Circuit in Johnson v. Uncle Bens, Inc., 965 F.2d 1363 (5th Cir. 1992) as well as similar holdings of other federal Courts of Appeals that have concluded that the Civil Rights Act of 1991 is to be given prospective effect only. 1992 U.S. App. Lexis 24836, *50-54.

While there was already a plethora of inconsistent lower court decisions prior to Davis, there is now a clear conflict in the circuits on this issue of national concern. Therefore, the Petition for Writ of Certiorari previously field in this matter should be granted to resolve

the conflict among the Circuit Courts of Appeals regarding retroactivity of the Civil Rights Act of 1991.

Respectfully submitted,



STUART M. NELKIN
CAROL NELKIN

NELKIN & NELKIN, P.C.
5417 Chaucer
P. O. Box 25303
Houston, Texas 77265
(713) 526-4500 (tel)
(713) 526-8915 (fax)

Supreme Court, U.S.
F I L E D
NOV 24 1992
OFFICE OF THE CLERK

No. 92-737

In The

Supreme Court of the United States

October Term, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

PHILIP J. PFEIFFER
Counsel of Record

FULBRIGHT & JAWORSKI
W. WENDELL HALL
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792
(210) 224-5575

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that § 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(b), does not apply to cases pending on appeal on the Act's effective date.

2. Whether the court of appeals correctly ruled that intervening Supreme Court decisions on controlling legal principles rendered by this Court during the pendency of this case on remand to the district court were properly considered and applied by the district court and whether the intervening Supreme Court decisions justified any departure by the district court from the mandate of the earlier court of appeals' decision.

LIST OF PARTIES

The parties are those listed on the cover.

Uncle Ben's, Inc. is a wholly owned subsidiary of Mars, Inc.

Uncle Ben's, Inc. has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 9

I. The courts of appeal have uniformly and correctly concluded that § 101 of the Civil Rights Act of 1991 does not apply retroactively to cases pending on appeal on the date of its enactment 9

II. In the context of this case, whether § 101 should be applied retroactively is a question of academic interest only and, for this reason, the Petition for Writ of Certiorari should be denied 13

III. The court of appeals properly considered and applied intervening Supreme Court decisions even if, arguably, this amounted to a departure from the mandate of the court of appeals' prior decision .. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Artis v. Hitachi Zasen Clearing, Inc., 967 F.2d 1132 (7th Cir. 1992) 10, 11

Banas v. American Airlines, 969 F.2d 477 (7th Cir. 1992) 10

Bennett v. New Jersey, 470 U.S. 632 (1985) 11, 12

Black Fire Fighters Ass'n v. City of Dallas, Texas, 905 F.2d 63 (5th Cir. 1990) 4

Bowen v. Georgetown Univ. Hosp., 109 S.Ct. 468 (1988) 11

Bradley v. Richmond School Board, 416 U.S. 696 (1974) . 11, 12

Davis v. City and County of San Francisco, No. Civ.A. 91-15113, U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992) 13

Falcon v. General Tel. Co., 815 F.2d 317 (5th Cir. 1987) 18

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 10, 11

General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 14

Gersman v. Group Health Ass'n, No. 89-5482, 1992 U.S. App. LEXIS 21615 (D.C. Cir. Sept. 15, 1992) 10

Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992) 10, 11

Holt v. Michigan Dep't of Corrections, 974 F.2d 771 (6th Cir. 1992) 10

TABLE OF AUTHORITIES – Continued

Page(s)

Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992) 10

Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984) 14

Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980) 1, 2, 14, 15, 17, 18

Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981) 1, 15, 16

Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992) ..... *passim*

Johnson v. Uncle Ben's, Inc., No. Civ.A. 74-H-435, 1991 U.S. Dist. LEXIS 19733 (S.D. Tex. May 2, 1991) .. 2, 3, 6

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992) 10

Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992) 10, 11

Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3261 (Oct. 5, 1992) (No. 92-248) 10, 11

Oliver v. Digital Equip. Corp, 846 F.2d 103 (1st Cir. 1988) 14

Parton v. GTE North, Inc., 971 F.2d 150 (8th Cir. 1992) 10

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 2, 3, 6, 7, 11, 12

Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985) 17

Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982) 4, 18

Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) 10

TABLE OF AUTHORITIES – Continued

Page(s)

Teamsters v. United States, 431 U.S. 324 (1977) 15

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 1, 15

Uncle Ben's, Inc. v. Johnson, 451 U.S. 902 (1981) 1

Valdez v. Mercy Hosp., 961 F.2d 1401 (8th Cir. 1992) .10, 11

Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3257 (Oct. 5, 1992) (No. 91-2001) 10

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 2, 4, 5, 8, 16, 18

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 4, 18

Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983) 14

Wilson v. Belmont Homes, Inc., 970 F.2d 53 (5th Cir. 1992) 10

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992) 10

STATUTES

20 U.S.C. § 1617 12

42 U.S.C. § 1981 ..... *passim*

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(k) 1, 7, 8, 13, 14

STATEMENT OF THE CASE

Thomas Johnson ("Petitioner") filed this suit in 1974 alleging that Uncle Ben's, Inc. ("Uncle Ben's" or "Respondent") discriminated against him and similarly situated Blacks and Mexican-Americans in violation of 42 U.S.C. § 1981. The complaint was amended in 1975 to add allegations under Title VII of the Civil Rights Act of 1964. Based upon the applicable limitation period for § 1981, Petitioner's claims were limited to the period commencing March, 1972.

At the end of Petitioner's direct case, all claims were dismissed except as to discrimination in promotion of Blacks. Thereafter, Respondent called its personnel manager and three experts. At the conclusion of Petitioner's direct examination of his expert rebuttal witness, but prior to cross-examination, the district court ruled for Respondent and subsequently entered detailed findings and conclusions.

The Fifth Circuit initially affirmed *per curiam*, but subsequently granted Petitioner's petition for rehearing, modified and affirmed in part, reversed in part, and remanded. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980) ("*Johnson I*"). Thereafter, this Court granted Uncle Ben's petition for writ of certiorari, vacated the Fifth Circuit's decision, and remanded the case in light of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *Uncle Ben's, Inc. v. Johnson*, 451 U.S. 902 (1981). On remand, the Fifth Circuit held *Burdine* inapplicable, and remanded the case to the district court for further proceedings as stated in *Johnson I. Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981) ("*Johnson II*").

Judge Sterling, the district court judge who originally tried this case and issued the opinion reviewed in *Johnson I*, died while the case was pending on remand. The case was then transferred to District Judge Lynn Hughes. On May 2, 1991, Judge Hughes granted judgment in favor of Respondent. As stated by the district court:

> The question on remand is: If promotion or upward mobility occurs at Uncle Ben [sic], do blacks suffer a disparate rejection rate in seeking promotions.[1] Although there is evidence that promotion does occur at Uncle Ben [sic], the impact Johnson described, taken most favorably to him, does not meet the requirements of the law. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Johnson's case fails on both the Title VII issues and the § 1981 issue.

Johnson v. Uncle Ben's, Inc., No. Civ.A. 74-H-435, 1991 U. S. Dist. LEXIS 19733 at *1 (S.D. Tex. May 2, 1991).

The Fifth Circuit affirmed. *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992) ("*Johnson III*"). As described by the court of appeals, the district court rendered judgment for Respondent because Petitioner failed to make a prima facie case of disparate impact and did not state an actionable claim under § 1981. *Id.* at 1366. The Fifth Circuit further described the district court's ruling:

---

[1] The district court's statement of the question on remand is totally consistent with the Fifth Circuit's explanation that the remand was required because "[t]he district court frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions." *Johnson I*, 628 F.2d at 425.

> The district court held that Johnson proved only that there was a "high percentage of Black employees at Uncle Ben [sic] in low-level jobs versus a low percentage of minority employees in high level jobs." Because Johnson failed to prove that low level employees were the appropriate pool of qualified persons in the relevant labor market, he failed to prove any disparate impact.
>
> The district court also found that Johnson failed to prove that any specific employment practice had a disparate impact upon the rate of Black promotion and that UBI had, in any event, rebutted any prima facie case by producing legitimate business reasons for its employment practices. Finally, relying on *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), the district court rejected Johnson's § 1981 claim, finding that the claim did not rest on discrimination in the formation of a new employment contract.[2]

Johnson III, 965 F.2d at 1366.

---

[2] With respect to the § 1981 claim, the district court also stated: "In addition to proving a new contract, Johnson must prove that Uncle Ben['s] intentionally discriminated; proof of merely an adverse effect is not sufficient." *Johnson v. Uncle Ben's, Inc.*, No. Civ.A. 74-H-435, 1991 U. S. Dist. LEXIS 19733 at *3 (S.D. Tex. May 2, 1991). While Petitioner now argues that this Court should allow him to maintain his claims under § 1981, Petitioner neither challenged the "intent" requirement of § 1981 nor pointed to any factual findings that would even arguably suggest that Respondent intentionally discriminated against anyone. Indeed, although in the context of discussing Respondent's claim of disparate impact, the district court ruled that Respondent had produced evidence of specific, legitimate reasons why Johnson and similarly situated Black employees had not been promoted, and Petitioner "offered no evidence to rebut Uncle Ben's business reasons for its employment practices." *Id.*

The court of appeals reviewed and generally described the trial evidence presented by Petitioner. In this context, and with respect to Petitioner's Title VII claim of disparate impact, the Fifth Circuit commented:

> Statistical disparities between the relevant labor pool and UBI's work force are not sufficient. *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982). A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989) (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 108 S.Ct. 2777, 2788, 101 L.Ed.2d 827 (1988) (plurality opinion)). Johnson must also "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs and promotions because of their membership in a protected group." *Watson*, 108 S.Ct. at 2788-89; *Pouncy*, 668 F.2d at 801 ("The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force"). Absent "a systematic analysis of the racial effects of all promotional criteria for each rank," *Black Fire Fighters Ass'n v. City of Dallas, Texas*, 905 F.2d 63, [66] (5th Cir. 1990), Johnson cannot establish a prima facie case of disparate impact.

Johnson III, 965 F.2d at 1367.

The three employment practices Petitioner claimed to be challenging were (1) Respondent's "educational requirements," (2) Respondent's "subjective system of

promotion," and (3) Respondent's use of irrelevant employment tests. 965 F.2d at 1367. The Fifth Circuit concluded that with respect to each of the challenged practices Petitioner failed to establish a prima facie case.[3]

After a detailed discussion of the evidence concerning Uncle Ben's educational requirements, the court of appeals stated:

> Assuming without deciding that some job zones at UBI should be compared with other lower UBI job zones, we find a complete absence of evidence that UBI employees were barred by educational requirements from reaching higher levels of employment at UBI. The district court did not clearly err in finding that Johnson failed to show that these alleged educational requirements affected Black promotion.

965 F.2d at 1369.

With respect to the argument that Uncle Ben's allowed its supervisors to make promotion decisions subjectively and that this practice adversely impacted Black promotions, the Fifth Circuit ruled:

> Johnson has not offered any evidence that Blacks' allegedly smaller number of promotions was causally related to this subjectivity. This cannot suffice to establish a prima facie case. *Wards Cove*, 109 S.Ct. at 2124-25.

965 F.2d at 1369.

---

[3] According to the Fifth Circuit, "Johnson was able to do little more than describe the content or application of the requirements. He failed *a fortiori* to show the specific effect that each had on Black promotions." *Johnson III*, 965 F.2d at 1367.

Finally, concerning Petitioner's allegation that Uncle Ben's "use of invalidated employment tests" had a disparate impact on Black employees seeking promotion, the Fifth Circuit concluded:

> Johnson presented no evidence of the effects of these tests on Black promotions. There was no testimony that Blacks performed more poorly on these tests than whites or that any Black employee was denied a promotion as a result of his performance on these tests. . . . Given the dearth of evidence on the effects of the various tests on Black promotion rates, we conclude that Johnson failed to establish any causal nexus between the scores and the alleged disparate impact.

965 F.2d at 1369.

The Fifth Circuit (as well as the district court) relied on this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and concluded that Petitioner's allegations of intentional discrimination were not actionable under 42 U.S.C. § 1981. 965 F.2d 1370-72. The district court reached this decision because Petitioner's allegations under § 1981 were based entirely on claims of discrimination with respect to wage increases and promotions – matters which involved "post-formation conduct of the employment relationship, rather than . . . the making or enforcing of a new contract." *Id.* at 1370 (quoting *Johnson*, 1991 U. S. Dist. LEXIS 19733, at *3 (S.D. Tex. May 2, 1991)). As to the promotions at issue, after reviewing the evidence the Fifth Circuit affirmed the district court's conclusion that "under the undisputed evidence there was no 'new and distinct relation between

employee and employer' within the meaning of *Patterson.*" 965 F.2d at 1372.[4]

While the appeal from the district court's opinion was pending before the Fifth Circuit, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("1991 CRA"). The Act became effective November 21, 1991.

Before the court of appeals, Petitioner argued that certain sections of the 1991 CRA should be applied to this case: (1) Section 105, which pertains to the burden of proof in Title VII disparate impact cases; and (2) Section 101(b), which expands the definition of what constitutes the making and enforcement of a contract for § 1981 purposes. Petitioner also argued that the district court had entered findings that went beyond the mandate of the *Johnson I* court. The Fifth Circuit correctly rejected each of these legal arguments.

Concerning the burden of proof in disparate impact cases, the court of appeals noted that the 1991 CRA, 42 U.S.C. § 2000e-2(k), did not alter the "particularity"

---

[4] In its opinion, the Fifth Circuit emphasized that Petitioner "presented little evidence of the precise nature of the promotions assertedly denied its class members." 965 F.2d at 1370. The court of appeals also noted that:

> Johnson's general contention that the promotions in this case involved "new and distinct relations" sits uneasily with his contention at trial that UBI's job zones represented routine steps in a sequential hierarchy in which work in each job zone gave the qualifications needed for the duties of the next zone.

965 F.2d at 1371.

aspect of *Wards Cove* as it applied to this case.[5] 965 F.2d at 1372. Accordingly, the Fifth Circuit held that application of the 1991 CRA would have no effect on the court's disposition of the Petitioner's Title VII disparate impact claim. *Id.* For this reason, the court of appeals stated there was no need to address whether the provisions of the 1991 CRA affecting Title VII disparate impact claims are retroactive. *Id.*

Recognizing that § 101 of the 1991 CRA would affect Petitioner's § 1981 claim if it applied retroactively to cases pending on appeal when the Act was enacted, the court of appeals did address this issue. The Fifth Circuit found that § 101 of the 1991 CRA should not be applied to a case pending on appeal that was filed and decided by the trial court before the enactment of § 101 and that arises out of conduct occurring before § 101's enactment. *Johnson III*, 965 F.2d at 1373-74. In reaching this finding, the court was persuaded by the unanimity of the other circuits on this issue and the general presumption against retroactive application of substantive laws. *Id.* at 1372-73.

With respect to Petitioner's argument before the court of appeals that the district court's findings went beyond the mandate of the *Johnson I* court, the Fifth

---

[5] Section 105(a) of the Act, 42 U.S.C. § 2000e-2(k)(1)(B)(i) provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice."

Circuit concluded that assuming, *arguendo*, they did, such a departure was justified based upon intervening Supreme Court decisions. *Johnson III*, 965 F.2d at 1370.

REASONS FOR DENYING THE WRIT

This case has a long and tortured history, spanning eighteen years of litigation. It has been the subject of numerous opinions and rulings from the district court to the Supreme Court. On three separate occasions, twice by the district court and with the most recent Fifth Circuit decision, final judgments have been rendered on the merits of this case. On each of these occasions the judgment of the court was that Petitioner's claim of racial discrimination failed. The questions now being advanced by Petitioner do not warrant or justify further review of this case.

The questions raised by this Petition were specifically addressed by the Fifth Circuit. The facts, applicable statutes, and controlling authorities, including decisions of this Court, were carefully considered by the court of appeals. Petitioner's arguments concerning retroactivity of the 1991 CRA and application of the mandate rule were rejected by the Fifth Circuit. The analysis and reasoning of that court is unassailable. Simply stated, the Fifth Circuit correctly decided this case.

I. The Courts of Appeal Have Uniformly and Correctly Concluded That § 101 of the Civil Rights Act of 1991 Does Not Apply Retroactively to Cases Pending on Appeal on the Date of its Enactment.

While the retroactivity question has been the subject of numerous decisions by the various courts of appeal,

the consistency of the rulings rejecting retroactive application of the 1991 CRA to cases pending on appeal at the time of its enactment is overwhelming.[6] The District of Columbia, Sixth, Seventh and Eighth Circuits have agreed with the Fifth Circuit's ruling that § 101 of the 1991 CRA is to be applied prospectively only. In fact, as to the precise question of whether § 101, which expands the scope of discrimination claims that can be pursued under 42 U.S.C. § 1981, is to be applied retroactively, the courts of appeals have uniformly answered no. *Gersman v. Group Health Ass'n*, No. 89-5482, 1992 U.S. App. LEXIS 2165 (D.C. Cir. Sept. 15, 1992); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of*

---

[6] *Gersman v. Group Health Ass'n*, No. 89-5482, 1992 U.S. App. LEXIS 21615 (D.C. Cir. Sept. 15, 1992); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992); *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53 (5th Cir. 1992); *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3257 (Oct. 5, 1992) (No. 91-2001); *Banas v. American Airlines*, 969 F.2d 477 (7th Cir. 1992); *Artis v. Hitachi Zasen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992) (*reh'g denied*); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3261 (Oct. 5, 1992) (No. 92-248); *Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992); *Parton v. GTE North, Inc.*, 971 F.2d 150 (8th Cir. 1992); *Valdez v. Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) (*reh'g pending*).

Corrections, 974 F.2d 771 (6th Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Artis v. Hitachi Zasen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3261 (Oct. 5, 1992) (No. 92-248); *Valdez v. Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) (*reh'g pending*).

After carefully considering the apparently inconsistent decisions of this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) and *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468 (1988), concerning statutory retroactivity, the Fifth Circuit concluded that retroactive application of § 101 is impermissible. *Johnson III*, 965 F.2d at 1373-74. Unlike some other provisions of the 1991 CRA, § 101 impacts the substantive rights, obligations and liabilities of employers. Fundamentally, § 101 makes illegal under § 1981 and imposes liabilities upon employers for post-formation employment conduct that was not previously illegal under § 1981. *Compare* 42 U.S.C. § 1981(b) *with Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). By expanding the scope of § 1981's prohibition, § 101 of the 1991 CRA provides employees with a cause of action that previously did not exist under that statute. There is no justifiable basis to apply § 101 retroactively and to thereby impose liabilities upon employers for conduct that was not illegal under § 1981 at the time it occurred.

In distinguishing *Bradley*, and as support for its decision to follow the more recent decision of this Court in *Bowen*, the Fifth Circuit was guided by the Court's reasoning and holding in *Bennett v. New Jersey*, 470 U.S. 632

(1985). In *Bennett*, this Court held that substantive provisions of amendments to the 1978 Amendments to the Elementary and Secondary Education Act cannot be applied retroactively. *Id.* at 638-40. Like this Court, Judge Higginbotham writing for the Fifth Circuit distinguished *Bennett* from *Bradley* noting that the rule in *Bradley* is limited by "another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Johnson III*, 965 F.2d at 1374 (quoting *Bennett*, 470 U.S. at 639). The court of appeals also emphasized that in *Bennett* this Court pointed out that *Bradley* concerned the allowance of attorney's fees under § 718 of the Emergency School Aid Act, 20 U.S.C. § 1617 – a *remedial* provision – not *substantive* obligations or rights under a statute. 965 F.2d at 1374.

Based upon this legal analysis, and after noting that the statutory language and legislative history of the 1991 CRA shed little light on the retroactivity question, the Fifth Circuit concluded:

> Section 101 affects substantive antecedent rights. Under *Patterson*, § 1981 did not prohibit discrimination in promotions before the enactment of § 101. Section 101 extended § 1981 to such discriminatory conduct. We then presume that § 101 does not apply to conduct that occurred before its enactment, absent clear evidence to the contrary. There is no such clear evidence.

965 F.2d at 1374.

As previously stated, there exists no conflict among the circuit courts on the question of whether § 101 can be

applied retroactively. However, one court of appeals, the Ninth Circuit, has held that § 113(b) of the 1991 CRA, which amended Title VII to allow for the recovery of expert fees as part of the costs, is retroactive. *Davis v. City and County of San Francisco*, No. Civ.A. 91-15153, U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992) (*reh'g pending*). While the Ninth Circuit spoke in broad terms, the only issue before it was whether § 113(b) of the 1991 CRA – a remedial provision – should be applied to a case pending on appeal when the Act became effective. This limited ruling, which does not address the question now before this Court concerning § 101, does not warrant granting the petition in this case.

The Fifth Circuit's decision on the issue of the retroactivity of § 101 is narrow. It is well reasoned and consistent with rulings on this issue by other courts of appeals. It is correct. Little, if any, support for granting Petitioner's writ can be drawn from the Ninth Circuit's decision in *Davis v. City and County of San Francisco*, because that opinion fairly addresses only the retroactivity of § 113(b) – a remedial provision – and does not address the retroactivity of § 101 which "affects substantive antecedent rights."

II. In the Context of this Case, Whether or Not § 101 Should be Applied Retroactively is a Question of Academic Interest Only and, For this Reason, the Petition for Writ of Certiorari Should be Denied.

Although originally filed under § 1981, with claims under Title VII later added, in its present posture this is singularly a disparate impact case. Under controlling

legal precedent decided by this Court and unaffected by the 1991 Civil Rights Act, liability can be imposed under § 1981 only upon proof of purposeful discrimination – intent is required. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). The disparate impact model is inapplicable to § 1981 claims. *General Bldg. Contractors Ass'n*, 458 U.S. at 383, n.8 (A claim under § 1981 cannot be established by "proof of disparate impact alone."); *see also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 111 (1st Cir. 1988) ("A plaintiff may not make a disparate impact claim under section 1981 since actions involving disparate impact can include practices which are neutral not only on their face but in terms of intent."); *Wilmore v. City of Wilmington*, 699 F.2d 667, 669-70 (3d Cir. 1983) ("The first and older theory under [Section] 1981 . . . and Title VII refers to the discriminatory treatment of minorities. This theory requires proof of discriminatory motive [citations omitted]. The second and more recent theory under Title VII *alone* is the "disparate impact" theory . . . . ") (emphasis added); *Irby v. Sullivan*, 737 F.2d 1418, 1424 n.7 (5th Cir. 1984) (intent required under § 1981).

The limited scope of Petitioner's claim as one of disparate impact alone is clear. In *Johnson I*, the Fifth Circuit remanded this case because, according to its analysis, the trial court's statement "the law does not say that the defendant shall not violate the rules of mathematical probability" was an incorrect assessment of the role of statistics in a Title VII case. *Johnson I*, 628 F.2d at 421. The court of appeals described Petitioner's theory in terms pertaining to a disparate impact case, *Id.* at 424; concluded that the district court had failed to answer the question of whether "blacks suffer a disparate impact in

seeking promotions," *Id.* at 425; and ultimately remanded with directions to "prepare new findings on discriminatory impact." *Id.* at 426.

Thereafter, when its judgment was vacated by this Court and remanded for further consideration in light of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Fifth Circuit concluded its decision in *Johnson I* was not altered by *Burdine*. *Johnson II*, 657 F.2d at 751 (5th Cir. 1981). This conclusion was justified, according to the Fifth Circuit, because "[w]hile *Burdine* . . . affects the burdens of the parties in Title VII disparate treatment cases, it does not address Title VII disparate impact cases," *Johnson II*, 657 F.2d at 752, and "[t]he present case involves charges of disparate impact." *Id.* at 753. In reaching this determination, the court of appeals added the following footnote:

> *See also id.*, 450 U.S. at 255, 101 S.Ct. at 1094 n.8, where the Court stated that the allocation of burdens set forth in *Burdine* is suited to the task of "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." Because no question of intentional discrimination arises under the disparate impact theory, *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977), the allocative scheme in *Burdine* was not formulated to develop the factual inquiry in a disparate impact case.

Johnson II, 657 F.2d at 752 n.2.

At least since the Fifth Circuit's 1981 opinion in *Johnson II*, Petitioner has fully embraced the position that his case is one of disparate impact – not one of intentional

discrimination. However, without regard as to whether § 105(a) of the 1991 CRA or the pronouncements by this Court in *Wards Cove* are controlling, the "particularity" requirement is unchanged, and on this basis the Fifth Circuit rejected Petitioner's disparate impact claim. *Johnson III*, 965 F.2d at 1369-70.

Now, with the demise of his disparate impact claim, Petitioner incorrectly argues that retroactive application of § 101 of the 1991 Civil Right Act would somehow revive his non-existent § 1981 claim. Petitioner's claims of intentional discrimination, which necessarily encompassed all allegations under § 1981, were disposed of by the Fifth Circuit's 1981 opinion in *Johnson II*. Assuming, *arguendo*, that § 101 applies retroactively, after *Johnson II* only disparate impact claims remained and such claims are not maintainable under § 1981. It is, therefore, respectfully submitted that the § 101 retroactivity question presented by Petitioner is, at most, an academic question only. Review by this Court is not justified as the ultimate outcome of this litigation would not be affected.

III. The Court of Appeals Properly Considered and Applied Intervening Supreme Court Decisions Even if, Arguably, this Amounted to a Departure from the Mandate of the Court of Appeals' Prior Decision.

Before the district court and, most recently, before the Fifth Circuit, Petitioner argued that his evidence of a statistical imbalance in the number of Blacks employed by Respondent in upper versus lower level positions in its workforce established a prima facie case of disparate

impact. Even if Petitioner properly identified the relevant labor pool, which he did not[7], such statistical disparities are not, and never have been, sufficient under this Court's rulings to establish a prima facie disparate impact case.

To circumvent this obvious failure of his burden of proof, Petitioner advanced before the Fifth Circuit the specious argument that the district court violated the mandate of the Fifth Circuit's prior opinion in *Johnson I* by considering intervening Supreme Court decisions and finding that a prima facie case had not been established. Now, before this Court, Petitioner claims that the Fifth Circuit violated its own mandate and impermissibly so.

The Fifth Circuit's response to this claim is obviously correct and, standing alone, demonstrates why this petition should be denied. The Fifth Circuit stated:

> We need not determine whether or not the district court's findings went beyond the mandate of the *Johnson I* court. Assuming *arguendo* that they did, we find that intervening Supreme Court decisions justified such a departure. The "mandate rule" is "a specific application of the 'law of the case' doctrine." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985). Under this

---

[7] The Fifth Circuit noted the district court's holding that "[b]ecause Johnson failed to prove that low level employees were the appropriate pool of qualified persons in the relevant labor market, he failed to prove any disparate impact." *Johnson III*, 965 F.2d at 1366. The Fifth Circuit further stated: "Johnson's data, . . . said little about *which* jobs at UBI were filled by promotion or, more importantly, from which jobs different UBI jobholders were promoted." *Id.*, at 1367.

> rule, the district court must follow an appellate decision on an issue in all subsequent trial proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result or if the appellate decision is clearly erroneous and, if implemented, would work an egregious result. *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987).
>
> If the *Johnson I* court held that a disparity between the proportion of Blacks in UBI's workforce and the relevant labor pool of qualified applicants together with the use of challenged employment practices were sufficient to establish a prima facie case of disparate impact, it has been contradicted by the Supreme Court's decision in *Wards Cove*, the Supreme Court's plurality opinion in *Watson*, and this court's decision in *Pouncy*. As we have explained, Johnson must identify a causal nexus between a specific employment practice and a disparity in Black promotions. The district court did not err in following *Wards Cove* and requiring evidence that the particular challenged practices caused a disparity in Black promotions.

Johnson III, 965 F.2d at 1370.

CONCLUSION

Petitioner has not presented any questions justifying Supreme Court review. The extended history of this case should be ended. For the reasons set forth in this brief in

opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. PFEIFFER
Counsel of Record

FULBRIGHT & JAWORSKI
W. WENDELL HALL
300 Convent Street, Suite 2200
San Antonio, Texas 78205
(210) 224-5575

Counsel for Respondent